



Analysis of International Legal Instruments Relevant to Fighting Environmental Crime

Work Package 2 on “Instruments, actors, and institutions”



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Abstract

Environmental crime was investigated on the basis on three conventions: the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES); the Convention on the Prevention of Pollution from Ships (MARPOL) and the Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (Basel Convention). The EU is not a party to one of these Conventions (MARPOL), will be a party on the basis of the basis of an enabling amendment (the CITES); and a party (the Basel Convention).

When the EU is bound by an international obligation, the EU enacts legislation, which is binding on its Member States. However, the EU sometimes also implements international rules although it is not bound by them. EU Member States can be bound by their international obligation as well as by the EU legislation that implements the international obligation (such as MARPOL).

CITES penalizes trade in, or possession of, specimens, or both; and to provide for the confiscation or return to the State of export of specimens.

MARPOL regulates and criminalises pollution from vessels.

The BASEL Convention introduced control over the transboundary movement of hazardous and other wastes. The Parties are obliged to adopt appropriate measures to minimize the generation of hazardous and other wastes and ensure adequate disposal facilities within the generating State. The Convention states that the Parties “consider” illegal traffic in hazardous wastes or other wastes as criminal and requires each Party to take appropriate legal, administrative and other measures to prevent and punish such conducts

Frequently the EU goes beyond the international regulation such as in the case of the MARPOL where it had gone further than the requirement of the IMO after oil spillages such as in the cases of Erika and Prestige accidents.

These Conventions are considered to be effective. However, there is a pending issue with compliance, notwithstanding that some of these Conventions (such the CITES and the Basel Convention) have instituted special bodies to monitor compliance. There are also States that avoid imposing criminal penalties. However, it may be said the criminal penalties under the MARPOL are frequently imposed.

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LIST OF ABBREVIATIONS

CAS	Condition Assessment Scheme
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CBT	Dedicated Clean Ballast Tanks
COP	Conference of the Parties
COW	Crude Oil Washings
EEZ	Exclusive Economic Zone
ESM	Environmentally Sound Management
EU	European Union
ECAs	Emissions Control Areas
ECJ	European Union Court of Justice
FAO	Food and Agriculture Organization of the United Nations
IBC	International Bulk Chemical
ICWC	International Consortium on Combating Wildlife Crime
IMDG	International Maritime Dangerous Goods
IMO	International Maritime Organisation
IOPP	International Oil Pollution Prevention Certificate
LOT	Load-on-top
MEAs	Multilateral Environmental Agreements
MPAs	Marine protected Areas
MSC	Maritime Safety Committee
NGOs	Non-governmental organisations
OECD	Organisation for Economic Co-operation and Development
OILPOL	Oil Pollution Convention for the Prevention of pollution from Oil
PSC	Port State Control
SBT	Segregated Ballast Tanks
TFEU	Treaty on the Functioning of the European Union
TRAFFIC	Trade Records Analysis of Fauna and Flora Commerce
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNICPOLOS	United Nations open Ended Informal Consultative Process on Oceans and the Law of the Sea
UNODC	United Nations Office on Drugs and Crime
WCMC	World Conservation Monitoring Centre
WCO	World Custom Organization

Executive summary

This project analyses environmental crimes at the international level on the basis of three instruments, namely, the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES); the Convention on the Prevention of Pollution from Ships (MARPOL) and the Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (Basel Convention). This study also takes into account the European legal order. These two levels establish distinct legal obligations. The legal issues and the working of these two levels will be illustrated by case-studies.

International obligations can be implemented by the EU legislation, but this only happens when the EU is a Party to and bound by the international obligation in question. However, there are many international obligations to which the EU is not a party and which are not implemented by EU legislation. States¹ bound by an international obligation have to implement it usually through national legislation transposing the obligation into the national legal orders. When the EU is bound by an international obligation, the EU enacts legislation, which is binding on its Member States. However, the EU sometimes also implements international rules although it is not bound by them. EU Member States can be bound by their international obligation as well as by the EU legislation that implements the international obligation.

CITES aims at ensuring that international trade in specimens of wild animals and plants does not threaten the survival of the species in the wild and accords varying degrees of protection to more than thirty-four thousand species of animals and plants. The EU is not yet a party to the Convention, but a new amendment made it possible. CITES provides for the following penalties: to penalize trade in, or possession of, specimens, or both; and to provide for the confiscation or return to the State of export of specimens.

MARPOL 73/78 is the main international Convention regulating pollution from vessels. The MARPOL Convention is one of the international legal responses that have been adopted after the occurrence of severe accidental releases of oil and other substances from ships. The EU is not a Party to the Convention. As to the punishment of “any violations of the requirements of the Convention”, Article 4 provides a double system of national prohibitions and sanctions. First, violations are to be prohibited and sanctions to be established under the law of the Administration of the ship concerned, wherever the violation occurs; and, secondly, violations are to be prohibited and sanctions established under the law of the Party within whose jurisdiction they occur.

The BASEL Convention seeks to provide enhanced control over the transboundary movement of hazardous and other wastes, so that it may act as an incentive for environmentally sound management (ESM) and reduce the frequency of such movements. The Parties are obliged to adopt appropriate measures to minimize the generation of hazardous and other wastes and ensure adequate disposal facilities within the generating State. Such measures are intended to ultimately reduce the transboundary movement of wastes. The Convention states that the Parties “consider” illegal traffic in hazardous wastes or other wastes as criminal and requires each Party to take appropriate legal, administrative and other measures to prevent and punish such conducts.

¹ We will refer to “States” throughout the text. That is merely for ease of reference and includes e.g. the EU as a potential or actual Party to treaty.

1 General Introduction

This report examines the criminal provisions of selected international environmental agreements that illustrate the different possibilities for criminalizing activities that damage the environment seriously in the legal systems of the State Parties. The targeted agreements are representatives of the *raison d'être* of the international environmental criminal law since they seek the protection of the environment from environmentally harmful actions that the international community has identified as being so serious that they must be subject to criminal law. These criminal provisions in these international agreements are “only a source of obligation, not a source of law”² and being so, they must be implemented in domestic legislation to sanction environmentally harmful conduct. They are also aimed at deterring those actions that cross national borders and have both a transnational impact and nature since they may be part of a chain of causation or of organized crime damaging the environment of states and spaces out of state jurisdiction such as the high seas.

At this stage of development of international environmental law, there is no international organization of the environment but a limited institutionalization of the multilateral environmental agreements (MEAs hereinafter) that address their basic interstate cooperation needs through the Conferences of the Parties and the Secretariats of the Conventions, provided by the United Nations Environment Program (UNEP). This deficit of environmental institutionalization has led to reliance for the enforcement of MEAs upon the international institutions as much as on municipal institutions at two levels of action: the international level where interstate cooperation is the main means of action and the domestic level where “prosecution of environmental crimes which international environmental conventions have introduced is only possible before national courts”³. After 2012 UN Conference on Sustainable Development, UNEP has started to be upgraded and is expected to play a more important role in enforcement.

These MEAs rely on their State parties⁴ to enact domestic legislation to sanction targeted environmentally harmful actions through administrative and criminal laws and to develop the domestic institutional system to combat environmental crimes, such as environmental police forces specialized in the protection of the environment and the judiciary. The European Union and its Member States as parties of most of the MEAs⁵ have added value to this process of enforcement of environmental criminal law through the adoption of the EU legal instruments that constitute the pillars for the harmonization of domestic criminal laws in order to protect the environment, as in the case of the Directive 2008/99/EC on the protection of the environment through criminal law and the Directive 2009/123/EC, amending Directive 2005/35/EC on ship source pollution and on the introduction of penalties for infringements.

Since no general solution covering environmental damage has been adopted at international level, but just sectoral instruments dealing with oil pollution, industrial accidents, transport of hazardous waste, etc., we have selected the three most representative agreements – CITES, MARPOL and BASEL – which have several characteristics in common.

² See Byung-Sun Cho, “Emergence of an International Environmental Criminal Law?”, *UCLA Journal of Environmental Law and Policy* 19, (2000/2001): 3.

³ Ibid.

⁴ For ease of reference, when we use “States Parties” in this context, this includes international organizations such as the EU.

⁵ The EU is not a Party of CITES and MARPOL but its Member States act on behalf of the EU in its fields of competence. The Gaborone amendment that will permit the EU to become a party to CITES entered into force in November 2013.

FIRST: These agreements deal with the environmental impact of human activities that are considered profitable from an economic point of view and are accepted as part of the risk society characterized by Ulrich Beck⁶. In the case of oil and hazardous waste, their transport is considered an accepted risk whose potential damage must be socialized through systems of liability. However, the growing gravity of these risks and their impact on the environment has moved the legal reaction to the territory of criminal law. All of the MEAs analysed here have incorporated criminal provisions as a way to raise social awareness and condemnation of environmentally harmful actions as well as deterrence. The offenders can be prosecuted criminally when infringing their legal regime.

SECOND: These agreements like all MEAs protect interests and values that must be guaranteed by the International Community since their loss and damage will affect the global population and will be felt beyond borders. However, on most occasions, environmental damage is the result of individual or corporate actions and MEAs require legislative State action at their domestic level.

THIRD, the criminal provisions of these agreements constitute “an ‘indirect’ criminal law emanating from international mandates of criminal sanctions for the violation of certain environmental norms”⁷, however, they are the source of obligations for the States Parties and have to be implemented in domestic legislation. The international origin of these rules explains their difficulties in taking root in the domestic legal systems, where on most occasions criminal laws are just ancillary to relatively new administrative laws protecting the environment.

FOURTH, these agreements provide for mechanisms to fight against States’ failure to enforce and comply with their obligations. As in the case of CITES, “a supportive and non-adversarial approach is taken towards compliance matters, with the aim of ensuring long-term compliance”⁸. Even though the CITES system for non-compliance was not envisaged in the original treaty text, it has gradually evolved as a result of continuous practice by the COP. The Basel and MARPOL Conventions have now incorporated compliance procedures. When Parties are found in non-compliance, they are given time to address the issue “within reasonable time limits”⁹, but in the absence of effective remedial action the Secretariats bring the matter to the notice of the Standing Committees that are mandated to “find a solution”¹⁰.

The prominent role of the Standing Committees in compliance issues has evolved over twenty years, prompted in part by a general tendency of the Parties not to want to name other Parties in more public COP meetings and in part by the need to make decisions on measures in between COP meetings. At a later stage, if a persistent pattern of failure to enforce is proven, then the COP and the institutions will consider the possibility of having recourse to promoting compliance mechanisms and to the formal dispute settlement mechanisms as a last resort.

FIFTH. The practice of these agreements shows how frequently systems for enforcing international law have failed to keep up with companies that operate transnationally, and how businesses – cruise lines, oil

⁶ Ulrich Beck, *Risk Society, Towards a New Modernity*, Sage Publications, London, 1992. The first sentence of this book: “In advanced modernity the social production of wealth is systematically accompanied by the social production of risks”, could just be attuned/linked with this research pointing out that the new risks attain environment, human health, security, etc.

⁷ Frédéric Mégret, “The Problem of an International Criminal Law of the Environment”, *Columbia Journal of Environmental Law*, vol. 35, 2010, p. 198.

⁸ CITES, Resolution Conf. 14.3, CITES compliance procedures, <http://www.cites.org/eng/res/14/14-03.php>

⁹ Resolution Conf. 14.3, CITES compliance procedures, para. 20.

¹⁰ Resolution Conf. 11.3 CITES (Rev. CP 13).

companies, etc. – have been able to take full advantage of legal uncertainties and jurisdictional loopholes. For these companies, activities damaging the environment such as operational discharges of oil or sewage or transporting waste to developing countries, are profitable and are done to save money and increase their competitive advantage over other companies complying with international and domestic rules. Organised crime is also a big problem for the enforcement of these agreements, since criminal networks can misuse their systems of permits and authorizations in order to legalise illegal products, and forge them to circumvent the measures adopted by international institutions and States parties to control poaching and smuggling.

SIXTH. These agreements have had strong support from the European Union which has become a reference as it stands as an example of regional enforcement providing a wide range of tools: from infringement procedures against its Member States as well as criminal provisions that they must incorporate into their domestic legislation to protect the environment. The EU has issued directives and regulations aimed at transposing into the EU legislation the international agreements with the goal of their implementation and enforcement by its Member States. The EU legal instruments have on occasions raised the bar of the protection foreseen in these international agreements. This has led to a practice that will be assessed in this report.

The CITES Convention 1973, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, envisages both the regulation of interstate cooperation as well as the shape of the domestic legislation addressing the trade in wild flora and fauna. CITES was born out of concern for the illegal trade on species of wild flora and fauna and its impact, being the first convention to call for the adoption of criminal measures to stop problems such as smuggling, poaching, etc. The actions against these crimes required interstate cooperation and the adoption of national legislation to build a system of export and import permits that allowed the national authorities to control the trade in wild species. Those responsible for these crimes were individuals, companies and even corrupt authorities of the States Parties to this Convention.

The MARPOL Convention 1973/1978 fighting oil pollution requires its parties to adopt deterrent sanctions in order to increase the adoption of preventive measures by those companies in charge of the transport of oil. The MARPOL Convention has evolved with the history of oil transport and has had to address some of the problems arising from environmental catastrophes, albeit slowly and not always effectively, which led the USA after the Exxon Valdes accident 1988 to adopt a unilateral position and to develop its Oil Pollution Act in 1990. Even the European Union, which usually stays within the rules set in the framework of the International Maritime Organization (hereafter IMO), went beyond the MARPOL requirements in order to address in a more effective way the problems of oil spillage such as in the cases of Erika 1999 and Prestige 2002 accidents. The MARPOL Convention is an example of the struggle to reconcile the interests of the flag states with those of the port states as well as those of the shipping industry. The US implementation of the MARPOL Convention adopts the approach of the port states and extends its implementation to all the vessels in its jurisdictional waters.

Moreover, the different Annexes of MARPOL have complemented the fields of possible impact on the environment, acknowledging the fact that economic development, scientific research and the understanding of the real impact of economic activities on the environment are progressing so much that an adequate answer to the problems comes sometimes too late. Some of these answers have been judged by its State parties as being insufficient and they have adopted solutions of their own.

The Basel Convention 1989 on the Control of Transboundary Movements of Hazardous Wastes states that its States parties consider illegal traffic in hazardous wastes and other wastes to be criminal. For that “Each party shall introduce appropriate national domestic legislation to prevent and punish illegal traffic”. The cooperation of States parties is required in order to enforce cross border obligations against illegal traffic. In practice, the enforcement of the Convention depends equally on the enactment of administrative and criminal law at the domestic level because the offender is a member of the State and is the one who operates without a license or violates license conditions. This legal and supervised traffic is considered not just as a profitable source of revenues from industries for developing countries but also as a solution to the

illegal traffic that could thrive under the shadow of the ban. The impact of this ban on the proliferation of organized crime will be examined in a further report.

These three major agreements are representative of the problems of enforcement of international environmental law just presented and consequently of the criminal provisions incorporated in them to fight against environmental crime. There are many international environmental agreements sharing the same problems of enforcement as those that will be examined in this report.

2 International and European Legal Instruments

International obligations can be implemented by the EU legislation, but this only happens when the EU is a Party to and bound by the international obligation in question. However, there are many international obligations to which the EU is not a party and which are not implemented by EU legislation. States bound by an international obligation have to implement it usually through national legislation transposing the obligation into the national legal orders. When the EU is bound by an international obligation, the EU enacts legislation, which is binding on its Member States. However, the EU sometimes also implements international rules although it is not bound by them. EU Member States can be bound by their international obligation as well as by the EU legislation that implements the international obligation.

Since the mid-seventies the EU has been concluding MEAs with all or some of its Member States, mostly in the form of ‘mixed-agreements’. As it has been highlighted “[t]his is a complex legal construction and the respective obligations and responsibilities of the Union and its member states both internally and externally are not straightforward”¹¹. The need to have recourse to mixed agreements derives from the fact that many fields covered by the MEAs fall partially within the shared competence of the EU and partially within the shared competence of Member States¹². At the moment of ratification or approval of a MEA the EU is required to declare its competence for entering into the agreement and for the implementation of the obligations resulting from it. This is called “declaration of competence”. However, the EU is not a party to some instruments analysed here, e.g. because the instrument only allows for States to become a party (as with CITES).

¹¹ Kati Kulovesi and Marise Cremona, “The Evolution of EU Competences in the Field of External Relations and its Impact on Environmental Governance Policies”, *Transworld Working Paper* 17 (2013): 1-18.

¹² Antonino All, “Non-Compliance Procedures in Multilateral Environmental Agreements: The Interaction between International Law and European Union Law”, in *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, ed. Tullio Treves et al. (The Hague: T.M.C. Asser Press, 2009): 521-534.

3 Multilateral Environmental Agreements Containing International Obligations for States Parties to Punish Environmental Crimes at the Domestic Level

This project analyses environmental crimes at the international level on the basis of three MEAs¹³, namely, the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES); the Convention on the Prevention of Pollution from Ships (MARPOL) and the Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (Basel Convention). This study also takes into account the European legal order. These two levels establish distinct legal obligations. The legal issues and the working of these two levels will be illustrated by case-studies.

¹³ In general see Philippe Sands, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2012), 96; Stuart Bell, Donald McGillivray and Ole W. Pedersen, *Environmental Law* (Oxford: Oxford University Press, 2013), 144-146; Tullio Treves et al., *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague: T.M.C. Asser Press, 2009), 2; Michael Faure and Jürgen Lefevere, "Compliance with Global Environmental Policy", in *Global Environment: Institutions, Law and Policy*, ed. Regina Axelrod, Stacy D. VanDeveer and David L. Downie (Washington: CQ Press, 2011), 172; Ulrich Beyerlin, Peter-Tobias Stoll and Rudiger Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements, A Dialogue Between Practitioners and Academia* (Martinus Nijhoff Publishers: Leiden/Boston, 2006); Rudiger Wolfrum and Volker Röben (eds), *Developments of International Law in Treaty-Making* (Springer: Berlin, 2005). Robin Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law", *American Journal of International Law* 94 (2000): 623-659.

4 The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention)¹⁴

4.1 Introduction

CITES is one of the oldest Multilateral Environmental Agreements (MEAs). It was signed in 1973 and it entered into force in 1975 (as of August 2013 it has one hundred and seventy-eight Parties).

CITES aims at ensuring that international trade in specimens of wild animals and plants does not threaten the survival of the species in the wild and accords varying degrees of protection to more than thirty-four thousand species of animals and plants. The Convention requires that States Parties adopt national legislation in order to implement several of its provisions¹⁵.

CITES works through the listing on Appendices of species of wild flora and fauna whose conservation status is threatened by international trade. The level of protection accorded to the species depends upon which Appendix of CITES it is listed. Once listed, imports and exports of the species concerned are subject to a permit system implemented by national management and scientific authorities. Thus, CITES depends for its implementation upon a working system of national regulatory authorities, and for its enforcement on, *inter alia*, working inspection and borders controls to ensure imports and exports of listed species only take place subject to the required permits¹⁶.

¹⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; 12 I.L.M. 1085 (1973). Available online: <http://www.cites.org/eng/disc/E-Text.pdf>. In legal doctrine see, among others, Peter H. Sand "Whiter CITES? The Evolution of a Treaty Regime in the Borderline of Trade and the Environment", *European Journal of International Law* (1997): 29-58; M. David Ong, "The Convention on International Trade in Endangered Species (CITES, 1973): Implications of Recent Developments in International and EC Environmental Law", *Journal of Environmental Law* 10 (1998): 291-314; Jon Hutton, Barnabas Dickson, ed., *Endangered Species, Threatened Convention: the Past, Present and Future of CITES, the Convention on International Trade in Endangered Species of Wild Fauna and Flora* (London: Earthscan, 2000); Rosalind Reeve, *Policing International Trade in Endangered Species: the CITES Treaty and Compliance* (London: Earthscan, 2002); Id., "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)", in *Making Treaties Work: Human Rights, Environment and Arms*, ed. Geir Ulfstein (Cambridge: Cambridge University press, 2007), 134-160; Peter H. Sand, "Commodity or Taboo? International Regulation of Trade in Endangered Species", *Green Globe Yearbook* (1997): 19-36, also available online. Accessed August 13, 2013. http://fni.no/YBICED/97_01_sand.pdf; Patricia W. Birnie, Alan E. Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford: Oxford University Press, 2009, 3rd edition), 685-692; Michael Bowman, Peter Davies, Catherine Redgwell, *Lyster's International Wildlife Law* (Cambridge: Cambridge University Press, 2010), 483-534; Willem Wijnstekers, *The Evolution of CITES, International Council for Game and Wildlife Conservation* (2011, 9th edition); Peter H. Sand, "Endangered Species, International Protection", in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2011), 423-429.

¹⁵ Cyrille De Klemm, *Guidelines for Legislation to Implement CITES, IUCN Environmental Policy and Law Paper No. 26, IUCN – The World Conservation Union* (1993). See also Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (London and New York: Routledge, 2011), 53.

¹⁶ Sands, *Principles*, 472.

CITES is a 'living instrument' that since the adoption of the original text has evolved through binding amendments, non-binding Recommendations (Resolutions and Decisions) taken by the Conference of the Parties (COP), and through practice.

Amendments have to be approved by a two-thirds majority of the Parties present and voting and have to be ratified by the Parties which have accepted them in order to enter into force, i.e. in order to be binding¹⁷. By way of example, the COP at its second meeting in 1979 adopted an amendment (so-called 'Bonn amendment') to the text of the Convention. This amendment consisted in widening the powers of the Parties during regular as well as extraordinary meetings to the effect that besides "mak[ing] such provision as may be necessary to enable the Secretariat to carry out its duties", they could also "adopt financial provisions"¹⁸. The amendment entered into force 60 days after 34 (two-thirds) of the 50 States that were Party to CITES on 22 June 1979 deposited their instruments of acceptance, i.e. on 13 April 1987¹⁹.

Recommendations adopted by the COP have played an extremely important role in the evolution of CITES and, as "soft"-law acts, they have made the CITES regime dynamic and flexible as they circumvent the delay imposed by treaty amendments²⁰. COP Resolutions periodically provide for the authentic interpretation of the Convention. By way of example, the COP at its ninth meeting specified the meaning of 'readily recognizable part or derivative' of specimens: "the term [...], as used in the Convention, shall be interpreted to include any specimen which appears from an accompanying document, the packaging or a mark or label, or from other circumstances, to be a part or derivative of an animal or plant of a species included in the Appendices, unless such part or derivative is specifically exempted from the provisions of the Convention"²¹.

4.2 The Institutional Structure

The institutional structure of CITES consists of the Secretariat, the COP, the Standing Committee, the Animals and the Plants Committees and the Management and Scientific Authorities operating at national level.

- The Conference of the Parties²² meets regularly every two to three years and may hold extraordinary meetings upon request of at least one-third of the Parties. The COP approves a budget for the Secretariat; it considers and adopts amendments to the Appendices; it reviews the progress of restoration and conservation of listed species and it makes recommendations (non-binding acts) for improving the effectiveness of the Convention. COP recommendations since 1994 have taken the form of 'resolutions', 'revised resolutions' and 'decisions'. Resolutions remain in effect until repealed or amended by a meeting of the COP, while Decisions remain in effect from one COP to the next.

- The Secretariat (based in Geneva) is administered by United Nations Environment Programme (UNEP) and oversees the general application of the Convention. The UNEP Executive Director is responsible for appointing the CITES Secretary General following consultation with the Standing Committee, while the latter oversees the development and execution of the Secretariat budget. Other

¹⁷ Art. XVII.

¹⁸ Art. XI(3)(a).

¹⁹ See the Convention website. Accessed August 12, 2013. <http://www.cites.org/eng/disc/bonn.php>.

²⁰ Reeve, *Policing International Trade*, 41.

²¹ Resolution Conf. 9.6 (Rev.).

²² See the Rules of Procedure of the Conference of the Parties. Accessed August 13, 2013. <http://www.cites.org/eng/cop/E14-Rules.pdf>. and Reeve, *Policing International Trade*, 37-52.

Secretariat staff members are appointed in consultation with the Secretary General. All staff falls under UN personnel rules.

The Secretariat arranges the various COPs and prepares the reports and draft resolutions to be considered during the COP meetings; it prepares an annual report on its activity and on the implementation of the Convention and it addresses the Parties with official notifications on various matters related to the Convention.

Certain NGOs, such as IUCN Environmental Law Center²³, the UNEP-World Conservation Monitoring Center²⁴ and Trade Records Analysis of Fauna and Flora Commerce (TRAFFIC)²⁵ play an important role in the functioning of the CITES Secretariat. These are usually contracted to carry out specific tasks as it will be described below.

- The Standing Committee²⁶ is a permanent advisory body whose members correspond to the six major geographical regions (Africa, Asia, Europe, North America, Central and South America and the Caribbean, and Oceania) and that is responsible, *inter alia*, for monitoring and assessing compliance with the conventional obligations. It is also responsible for taking decisions in relation to implementation and compliance; for overseeing the execution of the Secretariat's budget; for providing general policy advice on matters brought to it by the Secretariat and for the drafting of resolutions for consideration by the COP.
- The Animals Committee²⁷ and the Plants Committee²⁸ have been established by the COP and they report to it and to the Standing Committee. They are sources of specialized knowledge on certain species that are either controlled by CITES or may become so. They provide for scientific advice on issues relevant to trade in animal and plant species under the Appendices; they undertake periodic reviews on such animal or plant species and they handle nomenclature issues.
- The national Management Authorities instituted by each State Party are competent to grant permits without which the international imports and exports of specimens would be illegal. These Authorities also establish the national Scientific Authorities to advise them on the effects of trade upon any listed species. Although the mandate of these Authorities is limited to international trade, some Parties have given them additional responsibilities related to wildlife conservation.

4.3 Definitions

CITES states that 'specimens' may be living or dead and include "any readily recognizable part or derivative thereof"²⁹, namely, "any specimens which appears from an accompanying document, the

²³ Accessed August 12, 2013. http://www.iucn.org/about/work/programmes/environmental_law/

²⁴ Accessed August 12, 2013. <http://www.unep-wcmc.org/>

²⁵ Accessed August 12, 2013. <http://www.traffic.org/>

²⁶ See the Rules of Procedure of the Standing Committee. Accessed August 13, 2013. <http://www.cites.org/eng/com/sc/rules.pdf>.

²⁷ See the Rules of Procedure for Meetings of the Animals Committee. Accessed August 13, 2013. <http://www.cites.org/eng/com/ac/E-AC23-RoP.pdf>.

²⁸ See the Rules of Procedure for Meetings of the Plants Committee. Accessed August 13, 2013. <http://www.cites.org/eng/com/pc/E-PC-RoP.pdf>.

²⁹ Art. I(b).

packaging or a mark or label, or from other circumstances, to be a part or derivative of an animal or plant of a species included in the Appendices”³⁰.

CITES states that ‘species’ include “any species, subspecies or geographically separate population thereof”. Although the Parties have recommended that listing of a species in more than one Appendix should be avoided³¹, different populations of the same species have been considered independently for listing purposes. It has been noted that this split listings is important as it enables a Party with a non-endangered, well-managed population of a species that is endangered in other parts of its range to include its own population in Appendix II and thus allow a limited commercial trade which would be prohibited if the population was in appendix I. Conversely, it allows Parties to list an endangered population of a species in Appendix I and thus protect it from commercial trade in situations where the species is not endangered in other parts of its range³².

4.4 The Appendices

CITES contains three separate Appendices of species, and sets out the control and reporting mechanisms applicable to them: Appendix I includes those species threatened with extinction and in respect of which commercial trade is not appropriate or sustainable. Any trade listed in Appendix I species requires prior permits from both the importing and the exporting Country. Certificates are also required for the re-export of species; Appendix II includes those species not necessarily in danger of extinction but which may become endangered if trade in them is not strictly regulated, as well as those for which trade must be strictly regulated to permit effective control. An export permit is required for any trade in Appendix II species and must be presented to the importing State’s Customs authorities; Appendix III includes those species that individual Parties choose to make subject to regulation and which require the cooperation of the other Parties in controlling trade. Trade in Appendix III species requires the Management Authority of the exporting State to issue an export permit, if it is the State that included the species concerned in Appendix III, or a certificate of origin, if it is another Country³³.

The Convention lays down the criteria for including a species in Appendix I, II or III. These criteria have been modified and amplified by the ninth COP in 1994³⁴, as it will be described below.

As to the inclusion of species in [Appendix I](#), these criteria provide that a species has to satisfy a trade as well as a biological criteria: as to the former, Appendix I encompasses species that are or may be affected by trade when a) they are known to be in trade and that trade has or may have a detrimental impact on the status of the species, or b) they are suspected to be in trade, or there is demonstrable potential international demand for the species that may be detrimental to their survival in the wild³⁵. As to the biological criteria, Appendix I encompasses species that are “threatened with extinction”, namely, if the wild population is small and, in addition, there is, for example, “an observed, inferred or projected decline in the number of individuals or the area and quality of habitat”³⁶. With reference to the species that “look

³⁰ Resolution Conf. 9.6 (Rev).

³¹ Resolution Conf. 9.24 (Rev. COP 14), Annex 3.

³² Bowman et al., *Lyster’s International*, 490-492.

³³ *International Consortium on Combating Wildlife Crime, Wildlife and Forest Crime Analytic Toolkit, Revised Edition* (Vienna: United Nations Office on Drugs and Crime, 2012), 14.

³⁴ Resolution Conf. 9.24 (Rev. COP 14).

³⁵ Resolution Conf. 9.24 (Rev. COP 14) Annex V.

³⁶ Bowman et al., *Lyster’s International*, 493-494.

alike” Appendix I species, the first COP held in 1976 specified that they should have been included in Appendix II³⁷.

Appendix II – that is larger than Appendix I containing over thirty thousand species – includes species which are not sufficiently endangered to warrant inclusion in Appendix I but which may become so unless trade is controlled³⁸, as well as other species which are similar in appearance to and could be confused with a potentially threatened species³⁹.

Procedure for amending Annex I and II⁴⁰: each Party to the Convention, after consulting any relevant range State (the State where the species occurs naturally), can propose an amendment to Appendix I or II by submitting a request to the Secretariat at least 150 days before the meeting at which the amendment will be considered⁴¹. If no consultation has taken place, the proposing State must submit the proposal 330 days before the COP in order for the Secretariat to obtain the comments from range and non-range States. Proposals are then adopted if approved by two-thirds majority of parties present and voting and they take effect 90 days thereafter⁴² except for parties that opt-out during this time period. Parties which opt out are treated as non-parties with respect to trade in the species concerned.

In addition, it is stipulated that a species listed in Appendix I shall not be removed from the Appendices “unless it has been first transferred to Appendix II, with monitoring of any impact of trade on the species for at least two intervals between Conferences of the Parties”⁴³. It has been noted that “there has been much debate in recent years between those advocating a protectionist stance and those Countries, usually range States, which promote the sustainable use of wildlife”⁴⁴.

Appendix III includes “all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of a trade”⁴⁵. The objective of Appendix III is to provide a mechanism whereby a Party with domestic legislation regulating the export of species not listed in Appendix I or II can seek international help in enforcing its legislation.

Procedure for amending Annex III⁴⁶: each Party can unilaterally amend Appendix III by notifying it to the Secretariat. Additions take effect 90 days after the Secretariat has notified all the Parties, while withdrawals take effect 30 days after the notification.

4.4.1 Trade in Specimens Listed in Appendix I

International trade in specimens listed in Appendix I shall only be authorized in exceptional circumstances. The export without the prior grant and presentation of an export permit is not allowed. In order to obtain a permit the Scientific Authority of the State of export has to determine that “export will not be detrimental to the survival of that species” and the Management Authority of the same State has to verify that the specimen was acquired legally and, if alive, is “so prepared and shipped as to minimize the risk of injury,

³⁷ Ibid.

³⁸ Art. II(2)(a).

³⁹ Art. II(2)(b).

⁴⁰ Art. XV.

⁴¹ Willem Wijnstekers, *The Evolution of CITES, International Council for Game and Wildlife Conservation* (2011, 9th edition), 66-99.

⁴² Resolution Conf. 8.21.

⁴³ Resolution Conf. 9.24 (Rev. COP 14) Annex 4.A.1.

⁴⁴ Bowman et al., *Lyster’s International*, 497.

⁴⁵ Art. II(3). Wijnstekers, *The Evolution of CITES*, 115-121.

⁴⁶ Art. XVI.

damage to health or cruel treatment”⁴⁷. Furthermore, the Management Authority has to be satisfied that the State of import has already granted an import permit for the specimen.

Re-export, which is considered the export of any specimens previously imported,⁴⁸ is allowed for Appendix I species only after that the Management Authority of the State of re-export has verified that the specimens was imported into that State in accordance with the CITES provisions and, if alive, will be shipped with a minimum of risk of injury, damage to health or cruel treatment⁴⁹.

Import of Appendix I species is allowed only through an import permit and either an export permit or re-export certificate. The Scientific Authority of the State of import has to verify that the import is for purpose that are not detrimental to the survival of the species and that, if they are alive, the recipient is suitably equipped to house and care for it. Furthermore, the Management Authority of the State of import must verify that the specimen will not be used for primarily commercial purposes⁵⁰.

Finally, CITES prohibits the introduction into a State of Appendix I species from the sea, namely, “taken in the marine environment not under the jurisdiction of any States”, without a permit. The latter will be granted if the Scientific Authority of the State of introduction verifies that it is not detrimental to the survival of the species and if a Management Authority is satisfied that the other conditions for imports of Appendix I species have been met⁵¹.

4.4.2 Trade in Specimens Listed in Appendix II

The export permit for species listed in Appendix II is granted only if (a) a Management Authority of the State of export is satisfied that the specimen was acquired legally and, if alive, it is “so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment”, and (b) a Scientific Authority of the State of export verifies that “the export will not be detrimental to the survival of that species”. It has been highlighted that “many Countries of origin lack the scientific data on the status of their animal and plant populations, which makes it impossible to calculate the effects thereon of different levels of exploitation”⁵².

CITES prohibits the re-export of specimens of Appendix II species without a re-export certificate granted by the Management Authority of the State of export that has to verify that the specimen was imported in accordance with the CITES provisions and that, if alive, it will be shipped with a minimum of risk of injury, damage to health or cruel treatment⁵³.

CITES prohibits also the introduction of Appendix II species from the sea without a certificate that is granted by the Scientific Authority of the State of introduction once it has determined that the introduction will not be detrimental to the survival of the species. In addition, the Management Authority of the State of introduction has to verify that any living specimens will be handled so as to minimize the risk of injury, damage to health or cruel treatment⁵⁴.

CITES prohibits the import of specimens of Appendix II species if not accompanied by a valid export permit or re-import certificate⁵⁵. However, imports for commercial purposes are permissible and an import permit is not required: the State of export has to be advised by its Scientific Authority that the export will not be detrimental to the survival of the species.

⁴⁷ Art. III(2)(a)-(c).

⁴⁸ Art. I(d).

⁴⁹ Art. III(4).

⁵⁰ Art. III(3).

⁵¹ Art. III(5).

⁵² Wijnstekers, *The Evolution of CITES*, 136.

⁵³ Art. IV(5).

⁵⁴ Art. IV(6).

⁵⁵ Art. IV(4).

As to the amount of evidence that is required for the Scientific Authorities of a State of export to determine whether or not a proposed export of a specimen contained in Appendix I or II will be detrimental to the survival of that species, this has been subject of litigation in the United States⁵⁶. In a case brought by a private conservation organization against the United States Scientific Authority, the United States Court of Appeals for the District of Columbia Circuit ruled that the defendant did not have sufficient scientific data to support its finding that a proposed level of export of bobcat pelts would not have been detrimental to the survival of the species. The Court said that “the Scientific Authority cannot make a valid no-detriment finding without (1) reliable estimate of the number of bobcats and (2) information concerning the number of animals to be killed in the particular season. If the material is not presently available, the Scientific Authority must await its development before it authorizes the export of bobcats”⁵⁷. The Court also specified that “all the Scientific Authority is required to do is to have a reasonably accurate estimate of the bobcat population before it makes a non-detriment finding”⁵⁸. By contrast, the US Congress decided to amend the Endangered Species Act of 1973, that implements the CITES in the United States, by putting the duties of the United States Management and Scientific Authorities into the hands of the United States Secretary of the Interior. Furthermore, under the amendment the amount of evidence to be collected for a “no-detriment” finding does not require that the Secretary “make, or require any State to make, estimates of population size in making such determinations or giving such advice”⁵⁹. On this point it has been noted that “neither the views of the US Appeals Court nor those of the US Congress on the evidence required for a ‘no-detriment’ finding are binding on other parties to CITES. However, it might be argued that the Appeals Court decision should carry greater weight than their own courts in the eyes of other parties faced with a similar dilemma since it was non-biased judicial interpretation of the provisions of CITES, while the amendment to the Endangered Species Act was a politically motivated action designed to bring about a resumption in the export of bobcat pelts”⁶⁰. However, it is noteworthy that CITES Strategic Vision 2008-2020 established that “best available scientific information is the basis for non-detriment findings”⁶¹. Based on this statement, the COP has recently agreed on how to proceed with ‘no-detriment findings’ by providing the Scientific Authorities concepts as well as non-binding guiding principles to be taken into consideration⁶².

4.4.3 Trade in Specimens Listed in Appendix III

The restrictions on trade are limited to specimens originating from the State which listed them. The export of any specimens of a species included in Appendix III from any State which has included that species in Appendix III shall require the prior grant and presentation of an export permit⁶³. If the import is from any other State, a certificate of origin is sufficient⁶⁴. Re-export is permissible from any State without restriction provided a Management Authority of that State certifies that the specimen is being re-exported⁶⁵.

⁵⁶ Bowman et al., *Lyster’s International*, 504-505.

⁵⁷ 659 F.2d 168 (D.C. Cir.), cert denied, 454 U.S. 963 (1981).

⁵⁸ Ibid.

⁵⁹ Endangered Species Act of 1973, as amended, section 8A(C)(2). Bowman et al., *Lyster’s International*, 505.

⁶⁰ Ibid.

⁶¹ Resolution Conf. 16.3.

⁶² Resolution Conf. 16.7.

⁶³ Art. V(2).

⁶⁴ Art. V(3).

⁶⁵ Art. V(4).

4.5 Specimens not Listed in the Appendices

The application and enforcement of CITES provisions are necessarily limited to specimens of species listed in the Appendices. However, most timber species, for instance, are not listed in CITES and are not protected by any other international agreement. This means that the protection and enforcement mechanisms under CITES are not available to respond to illegal trade in endangered species that are not listed in the Appendices. Neither do they apply to any trade involving countries that are not a Party to CITES. As a result, trade through non-Parties may be used as a way to circumvent reporting and permit requirements. Several Countries have adopted additional legislation to prevent and suppress illegal trade in non-CITES species and extend the application of documentation, permit and reporting requirements to States not a Party to CITES. The CITES Secretariat also recommends the use of Convention standards in any trade involving non-signatory States, using 'comparable documentation' issued by competent authorities.

4.6 Permits and Certificates

The Convention requires that a permit or certificate is obtained for each consignment of specimens and that an export permit is considered valid only for six months from the date it was granted⁶⁶.

The twelfth COP adopted the criteria for the granting of permits and required that all the Parties adapt the content and format of their permits to the standardized version, that a security stamp is fixed for each permit and that no Management Authority issues permits retrospectively⁶⁷.

Furthermore, at its thirteenth meeting the COP discussed the use of electronic permitting systems to trade in CITES specimens⁶⁸. Some Parties expressed the view that the development of such a system would greatly assist in the handling and processing of CITES applications, and the collation and dissemination of CITES trade information⁶⁹.

4.7 Trade with non-Parties

CITES regulates trade not only between Parties but also between Parties and non-Parties. The criteria for trading with non-Parties have been adopted by the ninth COP and provide a very strict regulation under which the Parties cannot accept permits or certificate issued by a non-Party unless they respect the requirements of the Convention⁷⁰. The import-permitting requirement applies in fact even to non-Parties that must comply with the conventional provisions on export, providing less incentive for non-participation to the Convention. As it has been highlighted "the tough line taken with regard to international trade with non-parties may well have contributed to the large membership of the Convention since non-parties may feel the advantages of being a party, and therefore in a position to influence the development of the Convention, outweigh those of remaining outside where there are ever fewer states with which they can freely trade"⁷¹.

⁶⁶ Art. VI(2) and (6).

⁶⁷ Resolution Conf. 12.3 (Rev. COP 14). Wijnstekers, *The Evolution of CITES*, 157-194.

⁶⁸ See document COP13 Doc. 45.

⁶⁹ See CITES Electronic Permitting. Accessed August 9, 2013. <http://www.cites.org/common/cop/15/doc/E15-30-01T.pdf>.

⁷⁰ Resolution Conf. 9.5. (Rev. COP16).

⁷¹ Bowman et al., *Lyster's International*, 508.

4.8 Reservations

CITES allows parties to present a reservation with regard to any species included in the three Appendices. Reservations must be specific as to the species that they cover and must be taken at the time a Party deposits its instrument of ratification, acceptance, approval or accession to the Convention. However, there is also the possibility of reservations to amendments to the appendices at the time they are amended. Reasons for taking reservations need to be given although they are normally made by Parties objecting to increased protection for which they have an established trade.

CITES requires that Parties be treated as non-Parties in relation to trade in species on which they have taken reservations. It has been noted that reservations can be very damaging. “Not only reserving Parties can trade freely with non-Parties, but reservations sometimes encourage trade to continue, albeit illegally, with other Parties”⁷². Furthermore, Parties are under no obligation to provide for data on trade in species on which they have made reservations.

4.9 Compliance with CITES Obligations

The ‘compliance system’ established in 2004 under the CITES Convention has evolved through Resolutions and Decisions as non-binding instruments adopted by the COP, and through practice over nearly three decades⁷³. It may be mentioned from the outset that the CITES provides for criminal sanction for its breach (Article VIII, see more on it below).

4.9.1 Parties Reporting

Reporting relies mainly on self-reporting by Parties, but also on information provided by Interpol, the World Customs Organization (WCO) and the Lusaka Agreement Task Force, as well as by NGOs.

Parties have to report annually on CITES trade: they have to provide information on permits and certificates granted as well as the States with which the trade occurred and details of traded specimens listed in Appendices. Parties have also to report biennially on implementation and enforcement measures: they have to provide information on legislative, regulatory and administrative measures taken to enforce the provisions of the Convention⁷⁴.

The Secretariat has to analyze the reports – which are not publicly available – and has to request to Parties any other information necessary to ensure implementation of the Convention⁷⁵. On the basis of this information the Secretariat prepares the annual reports on the implementation of the Convention – besides the reports that it has to prepare on its own work⁷⁶.

At the thirteenth COP it was agreed to adopt a new format for the submission of biennial reports, in essence, a detailed questionnaire on implementation and enforcement⁷⁷. The Secretariat has arranged for United Nations Environment Program-World Conservation Monitoring Centre (UNEP-WCMC)⁷⁸ to

⁷² Ibid., 515-517.

⁷³ Rosalind Reeve, “The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)”, in *Making Treaties Work: Human Rights, Environment and Arms*, ed. Geir Ulfstein (Cambridge: Cambridge University Press, 2007), 136.

⁷⁴ Art. VIII(7). Resolution Conf. 11.17(Rev.COP13).

⁷⁵ Art. XII(d).

⁷⁶ Art. XII(g).

⁷⁷ See Guidelines for the preparation and submission of Reports. Accessed August 3, 2013. <http://www.cites.org/eng/resources/reports.php>.

⁷⁸ WCMC is a part of UNEP’s environmental monitoring and assessment system.

computerize statistics so that a detailed analysis of international trade can be produced on a species-by-species level. Once on the database, data are checked automatically and UNEP-WCMC notifies Parties on behalf of the Secretariat if any inconsistency is found⁷⁹.

However, it has been reported a generalized lack of compliance with the reporting requirements⁸⁰. It has been suggested that a useful start would be to review the experience gained in reporting from other Conventions and international institutions. The review would in fact provide the basis for proposing a mechanism to stimulate improved reporting by Parties on a sustained basis⁸¹. On this issue, the Parties have determined that failure to submit annual report on time “constitutes a major problem with the implementation of the Convention which the Secretariat shall refer to the Standing Committee”⁸². The Standing Committee in fact has been given the authority to decide which Parties have failed without adequate justification to provide reports for three consecutive years and following such a determination Parties are recommended to suspend trade in CITES-listed species with any such defaulting Party⁸³.

4.9.2 The International Monitoring Systems for Elephants: an Example

The tenth COP established two international monitoring systems to monitor the illegal trade in elephant specimens (ETIS) and the illegal killing of elephants (MIKE). These two systems are intended as monitoring tools to assess the effects of CITES decisions concerning the African and Asian elephant⁸⁴.

ETIS is a comprehensive information system to track illegal trade in ivory and other elephant products. Its aim is to record and analyze levels and trends in illegal trade, rather than the illegal killing of elephants. The central component of ETIS is a database on seizures of elephant specimens that have occurred anywhere in the world since 1989. The seizure database is supported by a series of subsidiary database components that assess law enforcement effort and efficiency, rates of reporting, domestic ivory markets and background economic variables. These database components are time-based and Country-specific and are used to mitigate factors that cause bias in the data and might otherwise distort the analytical results. The subsidiary database components also assist in interpreting and understanding the results of the ETIS analyses. Since its inception, ETIS has been managed by TRAFFIC on behalf of the CITES Parties and is currently housed at the TRAFFIC East/Southern Africa office in Harare, Zimbabwe⁸⁵.

Taking into account the ETIS report of TRAFFIC, at the sixteen COP it has been decided that the CITES Secretariat shall contact each Country identified as being of ‘importance to watch’ (Angola, Cambodia, Japan, the Lao People’s Democratic Republic, Qatar and the United Arab Emirates) to seek clarification on their implementation of CITES and other provisions concerning control of trade in elephant ivory and ivory markets, and shall report its findings and recommendations to the Standing Committee.

MIKE provides information needed for elephant range States to make appropriate management and enforcement decisions, and to build institutional capacity within the range States for the long-term management of their elephant populations. More specific objectives within this goal are: a) to measure levels and trends in the illegal hunting of elephants; b) to determine changes in these trends over time; and

⁷⁹ Bowman et al., *Lyster’s International*, 520.

⁸⁰ Reeve, *The Convention*, 139.

⁸¹ Reeve, *Policing International Trade*, 248-249.

⁸² Resolution Conf. 8.4 (Rev. COP 14).

⁸³ Ibid.

⁸⁴ Reeve, *Policing International Trade*, 81.

⁸⁵ See further information on the Convention website. Accessed August 8, 2013. <http://www.cites.org/eng/prog/etis/index.php>.

c) to determine the factors causing or associated with such changes, and to try and assess in particular to what extent observed trends are a result of any decisions taken by the Conference of the Parties to CITES⁸⁶.

4.9.3 Ensuring Compliance

The CITES system for non-compliance was not foreseen in the original treaty text but gradually evolved as a result of continuous practice by the COP and consolidated in Resolution 14.3 adopted in 2007 on 'CITES Compliance Procedures'.

Provided that a supportive and non-adversarial approach is taken towards compliance matters with the aim of ensuring long-term compliance, cases of non-compliance are usually notified by the Secretariat to the Standing Committee and/or the COP. Parties in fact generally do not bring cases of non-compliance⁸⁷.

For compliance issues the Secretariat may be "assisted by suitable intergovernmental or non-governmental international or national agencies and bodies technically qualified in protection, conservation and management of wild fauna and flora"⁸⁸.

When Parties are found in non-compliance, they are given time to address the issue "within reasonable time limits"⁸⁹, but in the absence of effective remedial action the Secretariat brings the matter to the notice of the Standing Committee that is mandated to "find a solution"⁹⁰.

The Standing Committee acts as a compliance committee in the absence of a formal committee of this nature⁹¹: it can ask the Parties found in non-compliance to produce a report on an issue; it can offer a written caution; it can advise as to specific capacity-building issues; it can offer assistance in a given State on invitation by such a State; it can issue a warning that a State is not complying with its obligations and it can ask for a compliance action plan indicating those steps a State will have to take to bring it back into compliance⁹².

When there is evidence of "unresolved and persistent" non-compliance and the Party has shown no intent to remedy the issue, the Standing Committee can recommend that commercial or all trade be suspended⁹³, i.e. it can take a countermeasure in the form of a trade embargo. In State practice, the embargo is collectively enforced by States exercising their right under Art. XIV(1)(a) of the Convention to adopt "stricter domestic measures regarding the conditions for trade [...] or the complete prohibition thereof" of CITES-listed species with the Country so targeted.

Under the compliance procedure of CITES the Standing Committee may decide to recommend the suspension of commercial or all trade in specimens of one or more CITES-listed species. By way of example, at the 61st meeting of the Standing Committee (Geneva, August 2011) the legislation of Nigeria was placed in Category 1 under the National Legislation Project and a SC recommendation to suspend trade (based on the absence of adequate legislation and law enforcement effort) was withdrawn; a set of three SC compliance indicators directed to Peru was determined to have been fulfilled, thereby avoiding a potential recommendation to suspend trade.

⁸⁶ See further information on the Convention website. Accessed August 8, 2013. <http://www.cites.org/eng/prog/mike/intro/index.shtml>.

⁸⁷ Rosalind Reeve, "Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime", *International Affairs* 82 (2006), 881-897.

⁸⁸ Art. XII(1). The work is often contracted out to NGOs, particularly IUCN, TRAFFIC (Trade Records Analysis of Fauna and Flora in Commerce) and FFI (Fauna and Flora International). On the whole, Parties perceive the role of contracted NGOs in a positive light and have not questioned the legitimacy of their work (Reeve, *The Convention*, 140).

⁸⁹ Resolution Conf. 14.3, para. 20.

⁹⁰ Resolution Conf. 11.3 (Rev. COP 13).

⁹¹ Resolution Conf. 14.3, 136.

⁹² *Ibid.*, para. 29.

⁹³ *Ibid.*, para. 30.

Recommended trade suspensions can be divided into two types: country-specific suspensions of trade in all CITES species, and species-specific suspensions of trade in Appendix II-listed species under the significant trade review. Country-specific trade suspensions may be recommended for persistent generalized non-compliance, lack of adequate national legislation and failure to demonstrate legislative progress under the national legislation project, and persistent failure to submit annual trade reports. These are considered voluntary suspensions and not binding. Furthermore, in what is effectively a voluntary import suspension, parties are advised not to accept export permits from countries that fail to notify the Secretariat of their Scientific Authorities (Issuance of permits by a Management Authority without appropriate Scientific Authority findings breaches the Convention.) Non-payment of contributions by parties to the CITES Trust Fund have been raised as another possible cause for trade suspensions, but the Standing Committee has been reluctant to agree, recommending instead that payment plans be drawn up and pressure exerted through visits by the Secretary General to missions in Geneva⁹⁴.

The prominent role of the Standing Committee in compliance issues has evolved over twenty years, prompted in part by a general tendency of the Parties not to want to name other Parties in more public COP meetings and in part by the need to make decisions on measures in between COP meetings⁹⁵.

The COP can review Standing Committee decisions and it “directs and oversees the handling of compliance matters particularly through the identification of key obligations and procedures”⁹⁶.

The Secretariat, on the other hand, assists the COP and the other Committees in relation to their compliance roles: it can collect and assess information relating to compliance from Parties, it can provide advice on, and make recommendations in relation to, achieving compliance and it can monitor the implementation of decisions concerning non-compliance⁹⁷. There are several examples of such suspension in trade relations. The prime examples concern smuggling of ivory elephant and rhino horn. Standing Committee recommends to State parties suspension of trade with States which failed to report trade in CITES protected species or if they did not adopt relevant legislation to penalize illegal wildlife trade, for examples Comoros, Guinea-Bissau, Paraguay and Rwanda⁹⁸.

4.10 Case Studies: The Case of the Illegal Trade in Ivory and Rhino Horn and Bigleaf Mahogany

4.10.1 The Illegal Trade in Ivory and other Elephant Specimens and Rhino Horn

In 1989, the COP of CITES decided to ban the international trade in ivory in order to fight against the decline in the African elephant population, due to widespread poaching. The continent’s overall population of elephants increased after the ban, but an analysis of elephant population data in the last years has shown that some of the 37 countries in Africa with elephants continued to lose substantial numbers of them, due to the unregulated domestic ivory markets in and near countries with declining elephant populations⁹⁹. The current situation has not improved with an estimated 17.000 African elephants illegally killed in 2011 at sites monitored by CITES, around 40 percent of the total elephant population in the continent.

⁹⁴ Rosalind Reeve, *Wildlife Trade, Sanctions and Compliance: Lessons*, 889.

⁹⁵ Reeve, *The Convention*, 140.

⁹⁶ Resolution Conf. 14.3, para. 10.

⁹⁷ *Ibid.*, para. 14.

⁹⁸ See Peter H. Sand, “Enforcing CITES: The Rise and Fall of Trade Sanctions”, *Review of European Community & International Environmental Law*, vol. 22 (2013): 251-263.

⁹⁹ Andrew M. Lemieux and Ronald V. Clarke, “The International Ban on Ivory Sales and its Effects on Elephant Poaching in Africa”, *British Journal of Criminology*, 49 (2009): 451-471.

The CITES compliance mechanism has focused on the control of the report and the combined actions of Parties and Organisations to fight the illegal ivory trade that involves transnational smuggling and poaching and organised crime networks that launder the ivory and forged CITES permits. The CITES compliance response to illegal trade is mainly through trade suspensions. However these measures have been circumvented by organized crime networks and INTERPOL along with United Nations bodies have been called upon to adopt complementary measures to fight the illegal trade manifestations that cannot be controlled by these trade suspensions¹⁰⁰.

The resources of CITES to fight these environmental crimes have decreased in the last years due to the economic crisis and the COP has requested Parties, donors and organizations to provide urgent financial and technical support to strengthen the implementation of Resolution Conf. 10.10 (Rev. CoP12) regarding control of internal ivory trade in elephant range states, adopting measures for:

- a) building capacity for law enforcement within elephant range States;
- b) improving public awareness of the conservation impacts from unregulated national trade in ivory;
- c) improving coordination and cooperation amongst national law enforcement agencies;
- d) registering and marking raw ivory in public and private possession, and registering and licensing all importers, manufacturers, wholesalers and retailers dealing in raw, semi-worked or worked ivory products;
- e) introducing recording and inspection procedures as part of a system of comprehensive and compulsory national trade controls; and
- f) urgently strengthening provisions in their national legislation concerning the regulation of internal ivory markets and the implementation of CITES in general where necessary.

The CITES Secretariat has assessed whether countries with active internal ivory markets (i.e. Cameroon, China, the Democratic Republic of the Congo, Djibouti, Ethiopia, Japan, Nigeria, Thailand, Uganda and the United States of America) have established the comprehensive internal legislative, regulatory and enforcement measures specified in Resolutions of COP regarding compliance with control of internal trade¹⁰¹.

Where such assessments demonstrate that a Party does not have adequate measures, the Secretariat shall provide technical assistance to that Party to adopt an action plan to establish and commit to a timeframe for developing, approving, enacting and implementing measures to adequately regulate trade in ivory.

The Secretariat is aware that TRAFFIC has undertaken many workshops, promoting effective ivory trade controls and encouraging Parties to report to the ETIS database. The Secretariat has supported, or participated in these activities, where possible, including through its MIKE programme. The Secretariat looks to countries that have benefited from such capacity building to move forward in implementing the Action plan forcefully. Since CoP14, the following countries have received such support: Cameroon, China (including the Province of Taiwan), the Democratic Republic of the Congo, Ethiopia, Mozambique, Myanmar, Thailand and Viet Nam¹⁰².

¹⁰⁰ See Conf. 10.10 (Rev. COP12).

¹⁰¹ See Conf. 10.10 (Rev. COP12).

¹⁰² See COP15 Doc. 44.1 (Rev.1) – 1.

In Resolution Conf. 11.3 (Rev. CoP14) (Compliance and enforcement), the Conference urges the Parties to “offer secondment of enforcement officers to assist the Secretariat in addressing law-enforcement issues”. Very few Parties have followed this suggestion, primarily because of the cost involved. The Secretariat now suggests that Parties offer secondment of officers to assist in verification activities with regard to the Action plan but on a short-term basis. For example, if Parties were willing to provide the services of an officer, and pay his salary, for perhaps two weeks to a month, the Secretariat would then use external funding to deploy that person on missions to relevant countries.

Another important aspect of current smuggling, which the law enforcement community is only beginning to gain insight into, is the origin and age of the ivory contraband. DNA profiling is enabling the geographical source of recent major seizures to be identified. Whilst this is clearly of great significance, it will be at its most useful if such information can be combined with the age of the ivory. Although tests to assess the age of ivory are still in development and are not widely employed, indications from some recent seizures suggest that some of the ivory may have been poached in the early 2000s. If accurate, this means that it came from elephants that were poached before the most recent legal trade occurred or was even authorized by the Conference of the Parties. As examinations of seized ivory to determine its origin and age become more common, this should provide a new perspective into poaching and illegal trade.

In its 62nd meeting in 2012, the Standing Committee adopted crucial measures to halt the escalation of ivory and rhino horn smuggling. It also recognized the need to work closely with all countries affected by the illegal supply chain of elephant ivory – range, transit and destination –. It requested countries and territories that are most affected by illegal ivory trade to adopt a series of immediate measures to control domestic markets and to combat smuggling.

The Standing Committee analyzed the drivers behind the exploding demand in rhino horn and requested the countries involved to report their actions to combat this illegal trade. In the case of Vietnam, it was encouraged to conclude, as a matter of urgency, the inventory of rhinoceros hunting trophies and verify their non-commercial use.

The Standing Committee reviews the work conducted by the Secretariat and the Parties for compliance with the different resolutions and in the case of non-compliance it may adopt recommendations to restrict the commercial trade in specimens of CITES-listed species to or from the Parties concerned.

The Secretariat and the Standing Committee reports have shown that China is using its carving industry to launder the illegal ivory. Citizens of China, or those of Chinese ethnic origin, continue to be discovered smuggling ivory. The Secretariat encourages the Government of China to continue its efforts to raise awareness among its citizens, both at home and abroad, of the penalties they face should they engage in such activities. The Secretariat notes the approach of the courts of Hong Kong S.A.R., China, which are imposing sentences of imprisonment upon persons entering their territory during attempts to smuggle ivory.

In the COP 16, the Secretariat presented a Report on the current situation of elephant poaching and ivory trafficking, and various initiatives to address them, such as to set an ivory enforcement task force, expand the use of controlled deliveries and develop an anti-money laundering and asset recovery manual with focus on wildlife crime.

The Standing Committee was to propose for approval by the COP a decision-making mechanism for a process of trade in ivory under the auspices of the COP16, as called for by the Parties at COP 14 (2007). This mandate of the Standing Committee of this mechanism has been extended with a view to defining a consensus-based proposal at COP 17 (2016). Many parties such as the EU Member States remain opposed

to a resumption of commercial ivory trade until this mechanism is in place, which should ensure that possible future trade does not encourage a continuation of illegal killing of elephants¹⁰³.

As discussed in COP16, the poaching crisis affecting the African rhinoceros also needs to be addressed through enforcement cooperation between the range States and the countries of final destination, in particular Vietnam. South Africa is the country most affected by poaching and its efforts against it should be further supported. Reducing the demand in the countries of final destination should also be a priority. Poaching and hunting trophy are the biggest threats, but applications for hunting trophies decreased in 2012 and now direct poaching of rhinoceros represents a far bigger threat to rhino populations in South Africa¹⁰⁴.

Concerning Rhinoceros, the COP16 has directed to all Parties Decisions 16.84 and 16.85 to reinforce the legislative and administrative measures to be adopted in case of seizure of illegal rhinoceros specimens made within their territories. All parties are to enact legislation or use existing legislation to:

i) facilitate the use of specialized investigation techniques such as controlled deliveries and covert investigations in the investigation of wildlife-crime-related offences, as appropriate, in support of conventional investigation techniques.

ii) maximize the impact of enforcements actions by using other tools and regulations such as anti-money laundering and asset forfeiture legislation in support of wildlife legislation, and

iii) prosecute members of organized crime groups implicated in rhinoceros related crimes under a combination of relevant legislation which carry appropriate penalties that will act as effective deterrents, whenever possible.

All Parties should also consult with the state of destination in order to establish the true nature of the trade and facilitate its monitoring. All Parties implicated in the illegal trade of rhinoceros horn as a range or consumer state, where applicable, should:

- a) develop and implement long-term demand reduction strategies or programmes and immediate actions aimed at reducing the illegal movement and consumption of rhino horn products, taking into consideration the draft demand-reduction principles included in the Annex to document COP16 Doc. 54.1. (Rev. 1), to achieve measurable change in consumer behavior;
- b) develop and implement strategies or programmes to enhance community awareness with regard to the economic, social and environmental impacts of illicit trafficking in wildlife crime, and to encourage the general public to report illegal activities related to wildlife trade to appropriate authorities for further investigation. Such strategies or programmes and immediate actions could include the involvement of local communities that live in the immediate vicinity of conservation areas, community policing projects or other strategies as may be appropriate; and
- c) provide information on the effectiveness of strategies or programmes (...) ¹⁰⁵.
- d) At the last COP16, measures have been addressed to those Parties involved in the illegal trade of rhinoceros horn such as VietNam, Mozambique and South Africa.

As has been said, the organized crime networks have developed different ways to circumvent CITES system of permits and quotas through forgery of permits and laundering illegal ivory through its carving.

¹⁰³ See Proposal for a Council Decision establishing the position to be adopted on the European Union's behalf with regard to certain proposals submitted to the 16th meeting of the Conference of the Parties (COP 16) to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Bangkok, Thailand, 3 - 14 March 2013, *COM(2013) 12 final*, 22.01.2013, p.9.

¹⁰⁴ See the Report prepared by the Secretariat on Elephant Conservation, Illegal Killing and Ivory Trade for the Sixty-third meeting of the Standing Committee Bangkok (Thailand), 2 March 2013, *SC63 Doc. 18*.

¹⁰⁵ See Decision 16.85.

INTERPOL in the framework of its project Wisdom has conducted annual operations¹⁰⁶ to target illegal trafficking of ivory, the last being Operation Wendi 2013 which covered illegal trafficking of ivory in West and Central Africa between January and May 2013 and resulted in some 66 arrests and the seizure of nearly 4,000 ivory products and 50 elephant tusks – in addition to military grade weapons and cash.

4.10.2 The Bigleaf Mahogany Trade in Peru

The Bigleaf Mahogany (*Swietenia macrophylla*) trade has led this species to the brink of its extinction in several zones of its natural distribution. Trade in the Appendix-II species bigleaf mahogany is highly profitable and there appears to be considerable pressure on wild populations of this species from commercial timber operations¹⁰⁷. In April 2005, during a mission to Peru for a training event, the CITES Secretariat learned of significant illegal activities in the country related to the harvest of and trade in bigleaf mahogany. The trade takes place in range countries where “laundering”, and illegal harvesting of timber appear to be legal.

The Secretariat considered that many range States currently have inadequate management and enforcement capacity to regulate the trade in a sustainable manner. The Secretariat noted that there is no mandatory or other system in place to distinguish clearly between timber of legal and illegal origin. Enforcement resources were seen to be limited and it was also noted that the penalties that have been imposed for illegal activities are very low and there seemed little to deter persons from engaging in illegal logging and trade¹⁰⁸.

This case is an important challenge to prove the capacity of the non-compliance mechanism to promote the enforcement of CITES, due to the lack of incentive for producing countries to adhere to international treaties such as CITES¹⁰⁹.

To fight these practices, the non-compliance mechanism was especially directed to Peru. In relation to that country, the Secretariat suggested that the Standing Committee recommend that, until further notice, Parties not authorize the import of specimens of bigleaf mahogany from Peru. It suggested that this recommendation remain in force until Peru had taken action to improve its regulation of trade in this species and until such improvement had been assessed by in situ verification by the Secretariat. In the meantime, the Secretariat has been working with Peru to improve its capacity and help develop adequate management and enforcement regimes. It also suggested that the Standing Committee encourage relevant governments and organizations to assist Peru in developing its capacity, especially since the necessary activities could act as a model for other range States.

The Standing Committee has been working with Peru since 2004. Some progress has been made, but the SC57 recommendations have not been fully met and that situation appears to be persistent. The Secretariat also expressed concern that Peru had achieved formal or ‘paper’ but not necessarily real ‘on-the-ground’

¹⁰⁶ Project Wisdom supports and enhances the governance and law enforcement capacity for the conservation of elephants and rhinoceros, available at <http://www.interpol.int/es/Crime-areas/Environmental-crime/Projects/Project-Wisdom>.

¹⁰⁷ Ani Youatt & Thomas Cmar, “The Fight for Red Gold: Ending Illegal Mahogany Trade From Peru”, NAT. RESOURCES & ENV’T, 3 (2009): 19.

¹⁰⁸ 54th Standing Committee Meeting, Interpretation and Implementation of the Convention: Bigleaf Mahogany, SC54 Doc. 31.1, at 2 (Oct. 2–6, 2006), available at <http://www.cites.org/eng/com/SC/54/E54-31-1.pdf>

¹⁰⁹ See Francis A. Tanczos, “A New Crime: Possession of Wood—Remedying the Due Care Double Standard of the Revised Lacey Act”, *Rutgers Law Journal*, 42 (2011): 573.

compliance with the Standing Committee's recommendations and indicators¹¹⁰. The attainment of the SC57 recommendations has been examined by the Secretariat in order to renew the trade suspensions, following the decision that the Standing Committee adopted on the information supplied by Peru¹¹¹. Before the Standing Committee, Peru has argued that "its implementation of the indicators offers a good example of a success story under CITES. Peru also believes that the evolution of the management of bigleaf mahogany in Peru shows how CITES can have a positive influence on the development and enhancement of information and control procedures which ensure that international trade does not compromise the survival of the species"¹¹².

CITES and the International Tropical Timber Organization (ITTO) have increased their cooperation to support efforts to ensure that the listings in Appendix II of this commercially traded timber species are fully implemented. The ITTO provided technical and financial support for meetings of the Bigleaf Mahogany Working Group and sponsored a Workshop on Capacity-building for the Implementation of the CITES Appendix-II Listing of Mahogany¹¹³.

The regional authorities have also undertaken actions to improve CITES' implementation: the Central American CITES authorities launched a regional workshop on CITES Implementation to improve international trade in mahogany¹¹⁴. It promoted the scientific reports to adopt a methodology to detect the laundering that can be reduced by revising the conversion factors used to calculate the yield of export grade sawn wood based on estimates of standing timber volume¹¹⁵.

Along with the CITES authorities, since 2005, the United States, the world's largest importer, has adopted measures to improve Peru's capacity building and has supported the Peruvian CITES Management Authority¹¹⁶. Its authorities control the volume of bigleaf mahogany imported into the United States and

¹¹⁰ The Standing Committee agreed that Peru would have until 30 September 2010 to fulfil three indicators for achieving 'on-the-ground' compliance with the Convention in relation to its mahogany trade:

- Installation of a modern, effective information system which is operational;
- Alignment of the forestry and CITES legislation and the work of relevant institutions in relation to quota determination and authorization for export; and
- Government's purchase of the additional timber authorized for harvest in 2008, which had been the subject of attempted ex post facto revision of the 2008 quota.

¹¹¹ Sixty-first meeting of the Standing Committee Geneva (Switzerland), 15-19 August 2011, Interpretation and implementation of the Convention, Species trade and conservation, Bigleaf, mahogany, Management of Bigleaf Mahogany in Peru, SC61 Doc. 50.2

¹¹² Ibid., para. 38.

¹¹³ See Proposed Resolution on Cooperation between CITES and ITTO regarding Trade in Tropical Timber, COP14 Doc. XX.

¹¹⁴ The World Bank FLEG program and CCAD organized the "Regional Workshop on CITES Implementation: Improving International Trade in Mahogany" in Managua, Nicaragua, August 15-17, 2007, to discuss the problem of illegal logging in the region for forest governance.

¹¹⁵ Roberto Kometter, Edgar Maravi, Methodology for Developing National Volume Conversion Tables (Standing Volume & Export Grade Sawnwood), The World Bank PC17 Inf. 3, September 2007, available at www.cites.org/common/.../pc/17/E-PC17-Inf-03.pdf last visit 8 December.

¹¹⁶ The United States has provided support to strengthen Peru's CITES Management Authority (INRENA) to implement the Appendix-II listing of bigleaf mahogany. This multi-year effort is part of the US-funded CEDEFOR Project that is implemented by WWF. Specific activities include strengthening INRENA's capacity to review forest management and harvest plans submitted by the forest concessions, with an emphasis on the mahogany regions (Madre de Dios and Ucayali).

provide this information to Peru on a regular basis to assist it in monitoring its exports of mahogany to the United States and in managing its export quota¹¹⁷.

4.10.3 Review of Significant Trade Procedure

This procedure reviews the status of species listed in Appendix II that are believed to be treated in significant numbers. On the basis of the reviews (which are usually desk-based and contracted out to NGOs), species are categorized according to the level of concern and recommendations for action are made by the Animal or Plants Committee as appropriate. These recommendations are directed to range States and if they do not respond within specified time limits they may be subject to a recommendation by the Standing Committee to suspend trade in the Appendix II-listed species concerned.

In 2001 the first country-based significant trade review was initiated. This involved a review of trade in all Appendix II-listed species found in Madagascar and an action plan based on the results of the review. The case is being seen as a pilot project, the outcome of which will determine whether a country-based approach is repeated¹¹⁸

4.11 National and Regional Enforcement

In the context of CITES, 'enforcement' generally relates to national enforcement of legislation implementing the Convention and to co-operative mechanisms at national, regional and international level between different enforcement agencies¹¹⁹.

There are practical problems with the enforcement of the Convention¹²⁰. Often is very difficult to identify illegal trade, particularly bearing in mind the sheer volume of the illegal trade. Officials are often under-resourced and inadequately trained, and effecting appropriate control mechanisms is a problem shared by all Parties – especially developing States due to their socioeconomic and geographic circumstances¹²¹.

It has been highlighted that “effective enforcement turns the Convention from paper into actuality. Ineffective enforcement undermines its very objective and every initiative to improve CITES implementation, from the national legislation project to the Significant Trade Review. Model legislation is all very well, but without enforcement its worth is no more than the paper on which it is written; monitoring populations and trade are all very well, but without enforcement CITES may be fiddling while Rome burns. Meanwhile, lack of cooperation and coordination among national, regional and international wildlife authorities, law enforcement agencies and NGOs, plays into the hands of organized wildlife crime networks, whose cooperation and coordination at all levels is more sophisticated”¹²².

Against this background, the Convention requires the Parties to take a number of different measures that are designed to improve the Convention's level of enforcement¹²³. Among these, there is the penalization of

¹¹⁷ Sixty-first meeting of the Standing Committee Geneva (Switzerland), 15-19 August 2011, Regional matters, Reports of regional representatives, North America, SC61 Doc. 56.5. Providing this information to Peru on a regular basis reminds it of the total volume of mahogany wood they are exporting to the United States and allows them the opportunity to stop issuing additional permits if the volumes exported approach the quota they have set.

¹¹⁸ Reeve, *Wildlife Trade*, 887-888.

¹¹⁹ Reeve, *The Convention*, 148. On Compliance and enforcement see Resolution Conf. 11.3 (Rev. COP 16).

¹²⁰ “Enforcement is the Achilles' hell of CITES” (Reeve, *Policing International Trade*, 249).

¹²¹ Bowman et al., *Lyster's International*, 525 and Wijnstekers, *The Evolution of CITES*, 237.

¹²² Reeve, *Policing International Trade*, 249-252.

¹²³ On steps recommended to improve compliance and enforcement see generally Resolution Conf. 11.3 (Rev. COP 16).

trade which violates the Convention and the confiscation of live or dead specimens which have been illegally traded or possessed¹²⁴. Art. VIII provides in fact that:

“The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:

- 1. to penalize trade in, or possession of, such specimens, or both; and*
- 2. to provide for the confiscation or return to the State of export of such specimens”*

4.11.1 Penalties

The COP at its eleventh meeting specified that “Parties should advocate sanctions for infringements that are appropriate to their nature and gravity”¹²⁵.

Penalties may also include confiscation (see further below).

It has been reported that “Hong Kong made some 350 prosecutions under its Animal and Plants (Protection of Endangered Species) Ordinance between June 1978 and November 1981, but a fine of approximately US\$ 1.000 was the highest penalty levied because it was the maximum allowed under the Ordinance at that time. Thus, although a trader who had illegally imported 319 cheetah skins into Hong Kong in 1979 was fined the maximum amount, the fine bore no relation to the value of the shipment. However, in 1997 the relevant Hong Kong Ordinance was amended to allow for the imposition of a HK\$5 million fine (approximately US\$640.000) and a term of imprisonment of up to two years. Of course, these represent maximum penalties in Hong Kong. A recent prosecution is more indicative of actual fines imposed in practice and arguably underlines that the imposition of inadequate fines remains an issue. Over three hundred live Indian star tortoises (listed on Appendix II) were found in an unclaimed bag on a flight from Malaysia, leading to the imposition on the offender of a HK\$29.000 fine (approximately US\$3.400) for illegal importation and a HK\$1.000 fine (approximately US\$130) for animal cruelty, together with a two-month suspended prison sentence. There is a growing number of cases in which offenders have been imprisoned. An individual thought to be responsible for widespread criminal activity in wildlife in India was sentenced to five years’ imprisonment in April 2004. This sentence was the harshest then imposed in India under the Wild Life (Protection) Act in 1972. In August 2004, following their conviction for poaching of and trading in the Sumatran tiger, five individuals were imprisoned for six years and also fined 70 million rupiah (approximately US\$7.750). It is thought that in the preceding ten-year period a minimum of sixty tigers were sold by the network to which these five people were connected. Moreover, a smuggler or trader in rare birds was given the then-longest sentence given by a UK court for a wildlife offence of six and a half years after being arrested at Heathrow Airport in July 2000. He was involved in the smuggling of twenty-three Appendix II-listed birds which had been placed in tubes fifteen centimeters in diameter for their flight to Bangkok. Around a quarter of the birds died in the flight. The offender was also found to have been keeping a large number of endangered birds at premises in Norfolk. In China, penalties can be even more severe; in March 2009 a smuggler of saker falcons was sentenced to death, and three accomplices to life imprisonment. There is certainly evidence that some parties will impose both heavy fines and prison terms on offenders; a Canadian in 2008 was sentenced in the US to five years’ imprisonment and fined US\$100.000 for illegally smuggling ivory from Cameroon¹²⁶”.

A study has noted that low awareness amongst the judiciary is also an exacerbating factor: even EU Member States with legislation allowing for high penalties may find that illegal traders escape heavy fines or imprisonment because prosecutors do not understand the impact that illegal trade can have on species,

¹²⁴ *Wildlife and Forest Crime Analytic Toolkit*, 15.

¹²⁵ Resolution Conf. 11.3 (Rev. COP16).

¹²⁶ Bowman et al., *Lyster’s International*, 527-528.

ecosystems and livelihoods. Since 2000 penalties in the UK have been increased and training workshops to raise awareness amongst the judiciary carried out¹²⁷.

Recently, a toolkit dedicated to wildlife and forest offences has been adopted by the International Consortium on Combating Wildlife Crime in order to help the States to comply with these provisions¹²⁸. The CITES Secretariat is a member of the International Consortium on Combating Wildlife Crime¹²⁹, that is the collaborative effort by five inter-governmental organizations (Interpol, United Nations Office on Drugs and Crime (UNODC), the World Bank and the World Customs Organization) working to bring coordinated support to the national wildlife law enforcement agencies and to the sub-regional and regional networks that, on a daily basis, act in defence of natural resources¹³⁰ (see further below: international cooperation).

This toolkit is intended to serve as non-binding guidelines that the Parties may use as a framework around which the domestic legislation can be developed.

As to 'sentencing and sanctions' the toolkit highlights that:

"wildlife and forest offences are seen by many, including investigators, researchers and, most importantly, perpetrators, as a high-profit, low-risk activity. This is because penalties for wildlife and forest offences are often lenient in relation to the crime committed. Accordingly, countries should take the measures necessary to ensure that the relevant offences [...] are punishable by effective, proportionate and dissuasive criminal penalties. Furthermore, convictions need to be followed by sentences that adequately:

- *Punish the offender to an extent or in a way that is justified in all circumstances;*
- *Provide conditions that will help the offender to be rehabilitated;*
- *Deter the offender and other persons from committing the same or a similar offence;*
- *Make clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; and*
- *Protect the community from the offender, where necessary.*

In addition, the court, in imposing a penalty for a wildlife or forest offence, may also take into account:

- *The extent of harm caused or is likely to be caused to the environment (including the natural habitat, species and biodiversity) by the commission of the offence;*
- *The practical measures that could have been taken to prevent, control, abate or mitigate the harm;*
- *The extent to which the person committing the offence had control over the causes that gave rise to the offence and the extent to which he or she could have reasonably foreseen the harm; and*
- *Whether, in committing the offence, the person was complying with orders from an employer or supervisor"*¹³¹.

As to the principles of sentencing:

¹²⁷ Maylynn Engler and Rob P. Jones, *Opportunity or Threat: the Role of the EU in Global Wildlife Trade* (TRAFFIC Europe, 2007), 14.

¹²⁸ *International Consortium on Combating Wildlife Crime, Wildlife and Forest Crime Analytic Toolkit, Revised Edition* (Vienna: United Nations Office on Drugs and Crime, 2012), 133-138. Accessed August 9, 2013. http://www.cites.org/common/resources/pub/ICWC_Toolkit_v2_english.pdf.

¹²⁹ Rob White, "What is to be Done About Environmental Crime?", in *The Routledge Handbook of International Crime and Justice Studies*, ed. Bruce A. Arrigo and Heather Y. Bersot (London and New York: Routledge International Handbooks, 2014), 458.

¹³⁰ "The International Consortium on Combating Wildlife Crime". Accessed August 9, 2013. <http://www.cites.org/eng/prog/icwc.php>.

¹³¹ *Ibid.* 135-136.

“In determining sentences, the court should be guided by the gravity of the offence, which is determined by the harm caused, and the culpability of the offender. The harm may be reflected in the damage that is caused by the offence to the environment or individual species, plants or animals, in the injuries, loss or other harm caused to individuals, and any detriment, loss or damage caused to local communities or the public at large. The culpability of the offender is generally reflected in his or her mental state at the time the offence was committed. Generally, higher penalties are reserved for those acting intentionally, knowingly or recklessly, while lower penalties (or no punishment) are appropriate for offenders acting negligently or with no fault of their own. The severity of the sentence will be further determined by evidence of mitigating or aggravating circumstances presented to the sentencing judge(s). For example, the commission of an offence for financial gain or on behalf of a criminal organization is a common circumstance that may aggravate a sentence. Recurrent offenders also often face higher penalties. Repeated breaches of the law can also be followed by the “blacklisting” of companies. Another important factor is that the courts tend to be lenient if, in their subjective judgment, they believe that wildlife and forest offences are less serious offences than other types of crime. Some organizations and individuals have recommended the requirement of minimum penalties as a possible way to counter this belief. These suggestions have, however, only very limited support as they may infringe upon the independence of the judiciary and limit the courts’ ability to take into account all relevant circumstances when determining a sentence”¹³².

As to ‘sanctions’ the toolkit specifies that:

“Most convictions for wildlife and forest offences presently result in the confiscation of illegally acquired property and assets, and the payment of fines and damages. Other types of sanctions include warnings, incarceration, territory bans, the deprivation of civic rights, bans on continuing the trade or the occupation in the course of which the offence was committed, licence or permit revocations, restrictions on being in possession of wildlife or forestry that is related to the offence or of specific tools and instrumentalities related to the offence, the publication of the offence, remediation and restoration. In practice, a combination of these sanctions may often be appropriate. Territory bans can be useful, for instance, in denying an offender access to an area or population of species which in turn may prevent illegal harvesting or poaching, and thus also break the illegal trade chain to transit and destination points. Bans on continuing the trade or the occupation in the course of which the offence was committed may equally be an effective means of preventing future violations. The same can be said for the suspension of logging and hunting licences, trade permits and so forth. In determining the appropriate sentence, it is pertinent that courts consider the whole range of sanctions provided for under current laws. Imprisonment should be reserved for the most serious offences. The imposition of sentences involving corporal or capital punishment should be discouraged. Administrative penalties (sanctions) are generally carried out by enforcement agencies, with the possibility of judicial review by aggrieved parties. Civil and criminal penalties usually require judicial involvement and depend upon the law and practice of the particular State. Certain penalties, such as fines, can apply to administrative, civil or criminal contexts”¹³³.

As to ‘restitution, compensation and restoration’:

“Offenders should, where possible and appropriate, make restitution to victims. The restitution should include the return of property or payment for the harm or loss caused, the reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights. In the context of wildlife and forest offences, restitution is particularly important where property rights of the victim(s) have been infringed or where environmental

¹³² Ibid. 136-137.

¹³³ Ibid., 137-138.

degradation has caused damage to the victim's property or reduced or destroyed the victim's legitimate source of income. In many instances, restitution would be paid to the State on behalf of the wildlife or forest and not to a specific victim. In such cases, restoration should also be considered for the time and cost of the clean-up, and for the medical treatment and rehabilitation of wildlife. The housing of confiscated live animals or plants, often over lengthy periods prior to court hearings or trials, can be extremely expensive, and prosecution authorities are encouraged to seek court orders requiring the offenders to pay these costs. Following the disposal of cases, consideration may have to be given to repatriating live animals to their countries of origin. This, too, can be highly costly and courts should consider imposing orders requiring that the offender bear such expenses. Courts in a number of countries require fines and other monetary penalties to be paid into funds established for this purpose, which are used for conservation purposes or to help subsidize enforcement activities. Courts should also consider handing the ownership of the items that were forfeited during sentencing to enforcement agencies for their subsequent use. This could include, for example, vehicles, boats or even aircraft. Restitution can be implemented in a number of ways and at various points in the system: as a condition of probation, as a sanction in itself or as an additional penalty. It can also be an outcome of a traditional court or an alternative mechanism, such as a victim-offender mediation process, or other restorative justice process. Some jurisdictions also enable victims to commence civil suits against perpetrators of wildlife and forest offences. In some cases, when the offender does not have the means to pay restitution, it can be offered in kind or in the form of services offered to the victim or to the community. As with all measures, it is crucial that restitution orders be effectively enforced and that the offenders face consequences should they not comply with the restitution orders. States should also endeavour to provide financial compensation where restitution or other compensation is not fully available from the offender or other source. In cases where the offender was an agent of the State or was acting on behalf of the State, the State has the responsibility to compensate victims for the harm that was caused to them as a result of the victimization. Some States have adopted legislation and established special mechanisms for providing victim compensation. If the harm caused by the offence results in environmental damage to public or private lands, it may also be possible for a court to order restoration or other remedial measures. Whether restoration is desirable or indeed possible depends on a number of factors, including the severity of the damage, the risk posed by that damage, the likely pace of natural regeneration, and the feasibility of artificial restoration and regeneration. In some cases, restitution may not be possible, for example for the felling of trees or killing of endangered animals. Preventive and monitoring activities should therefore be given higher priority"¹³⁴.

4.11.2 Confiscation

It has been pointed out that one of the problems of lack of implementation and enforcement of CITES lies on the failure to provide for penalties for violations and for the confiscation of specimens¹³⁵.

Regarding confiscation CITES requires that confiscated live specimens are either returned to their State of export or sent to a rescue center or to another appropriate place¹³⁶. Furthermore, the COP urged the Management Authorities to collaborate with the Scientific Authorities in order to avoid the risks associated with the return of the specimens to the wild¹³⁷.

¹³⁴ Ibid., 138-139.

¹³⁵ See Reeve, *Policing International Trade*, 248-49.

¹³⁶ Art. VIII. 4(b). See Wijnstekers, *The Evolution of CITES*, 261-298.

¹³⁷ Resolution Conf. 10.7 (Rev.COP15).

In relation to the disposal of confiscated live specimens included in the Appendices, the tenth COP has provided very detailed guidance¹³⁸. It is noteworthy that even though the Convention states that the expenses incurred in returning the specimens to the wild should be borne by the State of export¹³⁹, some State Parties, such as UK, have adopted a legislation that authorize the customs officials to recover the expenses for returning the specimens to the State of origin directly from the importer. The tenth COP upheld this approach and noted that “the successful recovery of the costs of confiscation and disposal from the guilty party may be a disincentive for illegal trade”¹⁴⁰.

The sixteenth COP adopted a decision compelling the Parties to submit a special report by 30 June 2014, to provide statistical information for the calendar year 2013 on administrative measures (e.g. fines, bans, suspensions) imposed for CITES, related violations: significant seizures, confiscations and forfeitures of CITES specimens, criminal prosecutions or other court actions; and disposal of confiscated specimens¹⁴¹.

Parties have developed a wide range of solutions to the problems of seizure and confiscation transposing the framework established by the following Resolutions¹⁴²:

- Resolution Conf. 9.9 on Confiscation of specimens exported or re-exported in violation of the Convention,
- Resolution Conf. 9.10 on Disposal of illegally traded, confiscated and accumulated specimens.
- Resolution Conf. 10.7 on Guidelines for the Disposal of confiscated live specimens of species included in the Appendices.

Belgium has a practice of funding conservation from the sale of confiscated specimens. After selling confiscated ivory at auction by the Customs Administration, the Governments of Belgium and Tanzania reached an agreement to use the funds for elephant conservation. In other cases involving Argentina, the Belgian Government delegated the administration of the funds to the CITES Secretariat with the purpose of supporting CITES in projects in this country¹⁴³.

Switzerland’s practice establishes that if the importer is not able to present valid documents within one month, the Management Authority confiscates the specimens. An extension of this time is possible in well-founded cases. When the States of export have been unwilling to cover the expenses of the return transport, confiscated live animals are registered and placed with appropriate institutions in Switzerland or in other parts of the world¹⁴⁴.

In the case of Spain, when the devolution to the country of origin is not possible, the authorities proceed to the selling or cession of the specimens and derivatives. In the case of “crime” or administrative infraction of smuggling (depending on the value of the animals and plants seized) the specimens will be sold and the money given to the Treasury. In the case of smuggling, it has been denounced by NGOs in Spain that the lack of resources of the special police has led to a controversial practice consisting of the specimens staying with their owner accused of administrative infractions. The protection centers in some of the autonomous communities of Spain have denounced that they cannot take into care the species object of confiscation.

¹³⁸ Resolution Conf. 10.7 (Rev. COP 15).

¹³⁹ Art. VIII. 4(b).

¹⁴⁰ Resolution Conf. 10.7 (Rev.COP15).

¹⁴¹ See Decisions adopted by COP16, <http://www.cites.org/eng/dec/valid16/E16-Dec.pdf>

¹⁴² See *CITES World. Official Newsletter of the Parties*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Issue Number 16, December 2005. This number focuses on confiscation of specimens of CITES-listed species, starting with the obligations imposed by CITES and an explanation of the approach adopted by the Parties on how to deal with confiscated specimens and their disposal. It will be quoted as CITES World Official Newsletter on Confiscation hereinafter.

¹⁴³ CITES World Official Newsletter on Confiscation, at 6.

¹⁴⁴ CITES World Official Newsletter on Confiscation, at 5.

One danger that the consulted experts appreciate is that these exotic animals who are left with their owners end up abandoned since the situation to regularize the documents or provide maintenance in accordance with the law is unworkable¹⁴⁵.

Spain is also a transit country as well as a destination. In March 2013, 111 pieces of ivory were seized by the special police from two auction houses. The pieces had been artificially aged in order to conceal their origin, most probably trophies and poaching from Botswana, Zimbabwe Namibia and South Africa.

In the case of the UK, the key figure is the officer responsible for coordinating all the re-homing of all live specimens confiscated at the UK's ports and airports¹⁴⁶.

The experience of Indonesia with the disposal of illegally traded, confiscated and accumulated specimens is particularly important since it is a major wildlife producer and exporter. "With the intensification and strengthening of CITES law enforcement in Indonesia, interception of smuggling has improved and illegally-traded specimens have been confiscated in Indonesia, usually during attempts to export them. For live specimens, especially of nationally-protected and Appendix-I species, the first consideration is given to the possibility of returning the specimens to the wild. For this purpose the Government has established several live-animal post-confiscation rescue and orangutan rehabilitation centers"¹⁴⁷. The decision on the final disposal of the confiscated specimens is taken jointly by the provincial office of the Management Authority and the rescue center. Indonesia has expressed concern with the application of Resolution Conf. 9.10 which stipulates that confiscated specimens of Appendix-II and III species may be subsequently sold by the Management Authority. Indonesia considers that this Resolution "provides loopholes for irresponsible traders to undertake 'legalized laundering' which to a certain degree will be able to cause bad impacts on the populations of the species as well as financial loss to the country of source"¹⁴⁸. Indonesia is aware of one instance where confiscated reptile skins illegally shipped from Indonesia were seized and confiscated on arrival in another country and then auctioned by the Management Authority of that country without informing the Indonesian authorities. Being kept informed of this case would have influenced subsequent Indonesian non-detriment findings for trade in the species concerned, and the revenue from the sale could have been invested in conservation in Indonesia.

Indonesia has presented a proposal aiming to allow the sale of confiscated Appendix I specimens in certain situations, thereby extending a possibility only foreseen currently for Appendix II and III specimens under Resolution Conf. 9.10. In addition, the proposal states that the country of origin should benefit from the income from the sales of confiscated specimens, which could amount to rewarding countries of origin which did not prevent an illegal exportation from their territory¹⁴⁹.

The Secretary-General of CITES has also intervened to mediate in a dispute between Indonesia and Thailand regarding the return to Indonesia of 11 orangutans confiscated by the CITES Management Authority of Thailand. As provided by the Convention, the determination of the most suitable long-term

¹⁴⁵ See the website of SEPRONA, the Spanish authority in charge of the protection of the environment, at http://www.guardiacivil.es/en/institucional/especialidades/Medio_ambiente/index.html,

¹⁴⁶ CITES World Official Newsletter on Confiscation, pp. 7-9.

¹⁴⁷ *Ibid.*, p. 9.

¹⁴⁸ Indonesia submitted to the COP 14 a document on the Interpretation and implementation of the Convention. Compliance and enforcement issues. Disposal of Illegally traded and confiscated specimens of Appendix II and III species, COP14 Doc. 27.

¹⁴⁹ Finally the 16 COP addressed Decision 16.4 to the Standing Committee to review Resolutions Conf. 9.9, Conf. 9.10 (Rev. COP15) and Conf. 10.7 (Rev. COP15) with a view to determining whether to consolidate any of their provisions or simplify their provisions, and report its conclusions and recommendations at the 17th meeting of the Conference of the Parties. See Decision 16.47 on Disposal of illegally-traded and confiscated specimens of Appendix-I, -II and -III species, http://www.cites.org/eng/dec/valid16/16_47.php.

home for confiscated animals rests with the State of confiscation, following consultation with the State of export. The State of confiscation may consult with the Secretariat, whenever it considers this desirable, but the CITES Secretariat has no power to decide the final destination of confiscated animals¹⁵⁰.

In the case of the USA, the enforcement officers have different options to cope with contraband: to return live animals and plants to the export country or 'placing' wild animal, parts and derivatives thereof and wild plants in ad hoc networks of qualified institutions, such as accredited zoos, aquaria and nature centers, which can provide temporary or long-term care. Moreover, the authorities may destroy items or sell confiscated wildlife property that is not in itself barred from commerce, and the benefits are destined to pay rewards to people who help the authorities to solve wildlife crimes.

CITES gives no guidance to States Parties as to the level of penalties that should be imposed on persons convicted of illegal trade or possession, with the result that there has been a considerable variation in the punishments inflicted. It has been highlighted that one of the major problems in relation to the enforcement of the Convention is the fact that in many Parties penalties are insufficiently high and not much of a deterrent for illegal traders¹⁵¹.

4.12 International Cooperation

The COP at its eleventh meeting addressed the enforcement activities of the Secretariat and "direct[ed it] to pursue closer international liaison between the Convention's institutions, regional and sub-regional wildlife enforcement networks and national enforcement agencies, and to work in close cooperation with ICPO-INTERPOL, the United Nations Office on Drugs and Crime, the World Bank as ICCWC partner organizations"¹⁵².

In order to realize this cooperation the CITES Secretariat has entered into a number of memoranda of understanding with other institutions, such as the Secretariats of other MEAs (e.g. of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, of the Vienna Convention for the protection of the ozone layer, of the Montreal Protocol on substances that deplete the ozone layer and of the Convention on biological diversity), international organizations (e.g. FAO and UNCTAD), Governments (e.g. The Department for environment, food and rural affairs of the United Kingdom) and NGOs (e.g. TRAFFIC International)¹⁵³.

4.12.1 World Customs Organization and Interpol

Cooperation with WCO and Interpol dates back to early COPs. Since then the CITES Secretariat has signed with them memoranda of understanding that provide for an exchange of information and strengthened cooperation, joint publication of information materials to combat wildlife crime, and joint training for police, customs and other enforcement officers.

With regard to WCO, from 1996 to 2001 WCO has organised a WCO/CITES Working Group. As one of the results, Customs and CITES training materials were developed and disseminated to WCO Members. Furthermore, the 1996 memorandum of understanding between WCO and CITES provided for a joint database on CITES offences. Unfortunately, this joint database never materialised¹⁵⁴, however, WCO expects that the new model will have an impact on CITES¹⁵⁵. With regard to Interpol, observers from the

¹⁵⁰ Statement by the Secretary-General of CITES on concerns expressed about confiscated orangutans, of 20 May 2010.

¹⁵¹ Wijnstekers, *The Evolution of CITES*, 237; *Wildlife and Forest Crime Analytic Toolkit*, 44-45.

¹⁵² Resolution Conf. 11.3 (Rev. COP16).

¹⁵³ See the Convention website. Accessed August 12, 2013. <http://www.cites.org/eng/disc/coop.php>.

¹⁵⁴ Reeve, *Policing International Trade*, 228.

¹⁵⁵ See the WCO website. Accessed August 9, 2013. http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/pf_tools_datamodel.aspx

CITES Secretariat usually participate in the Interpol Wildlife Working Group established in order to focus on the expertise and experience of law enforcement officers on the poaching, trafficking or possession of legally protected wild fauna and flora¹⁵⁶. The COP at its eleventh meeting encouraged State Parties to nominate officials from the relevant national enforcement and prosecution agencies to participate in the Interpol Wildlife Working Group¹⁵⁷. The main objective of the Working group is to contribute to the fight against illegal trade in endangered species by improving information exchange and encouraging international analyses.

The so-called Ecomessage¹⁵⁸ can be submitted to both the CITES and the Interpol Secretariats, and has been the standard format for reporting infractions and illegal trade since 1995. Information collected by Ecomessages and entered into the database allows Interpol's criminal analysts to study the data and begin to discern such information as the structure, extent and dynamics of international criminals and organizations involved¹⁵⁹.

4.12.1 International Consortium on Combating Wildlife Crime

According to the ICCWC's website it has been established to support national wildlife law enforcement agencies: its mission is to usher in a new era where perpetrators of serious wildlife crimes will face a formidable and coordinated response, rather than the present situation where the risk of detection and punishment is all too low.¹⁶⁰ In this context, ICCWC will mainly work for, and with, the wildlife law enforcement community, since it is frontline officers who eventually bring criminals engaged in wildlife crime to justice. ICCWC seeks to support development of law enforcement that builds on socially and environmentally sustainable natural resource policies, taking into consideration the need to provide livelihood support to poor and marginalised rural communities¹⁶¹.

A product of the consortium is the development of the above mentioned Wildlife and forest crime analytic toolkit, built on the technical expertise of all ICCWC partners as well as through extensive consultations with experts from across the globe from a variety of related fields. The Wildlife and Forest Crime Analytic Toolkit (2012) is intended to serve as an initial entry point for national governments, international actors, practitioners and scholars to better understand the complexity of the wildlife and forest crime, and to serve as a framework around which a prevention and response strategy can be developed¹⁶². The use of the Toolkit will provide government officials, Customs, police and other relevant enforcement agencies with a framework to analyse, prevent, detect and combat wildlife and forest offences. The Toolkit will be tested in partnership with selected national governments. The DGF funds secured through the World Bank, one of the ICCWC partners, will significantly contribute to this process. The World Bank provides DGF resources in an annual process out of the net income derived from its international lending operations to support innovation in development strategies and approaches. This year, the Bank's Board of Executive Directors

¹⁵⁶ *INTERPOL and CITES Secretariat, Wildlife Crime Working Group, Practical Guide for the Use of the CITES Management Authorities in Collaboration with the International Criminal Police Organization (INTERPOL)* (Lyon, France and Geneva: INTERPOL and CITES Secretariat, 2005).

¹⁵⁷ Resolution Conf. 11.3 (Rev. COP16).

¹⁵⁸ See Notification of the CITES Secretariat No. 851 of 18 April 1995 through which it communicated to the Parties that the ECOMESSAGE had been approved by the General Assembly of ICPO-Interpol as the form for reporting on crime involving international trade in and transport of dangerous goods, nuclear waste and specimens of wild fauna and flora.

¹⁵⁹ See Notification of the CITES Secretariat to the Parties No.28 of 22 July 2009. Accessed August 9, 2013. <http://www.cites.org/eng/notif/2009/E028.pdf>

¹⁶⁰ International Consortium on Combating Wildlife Crime website.

¹⁶¹ *Ibid.*

¹⁶² *Wildlife and Forest Crime Analytic Toolkit*. Accessed August 9, 2013. http://www.cites.org/common/resources/pub/ICCWC_Toolkit_v2_english.pdf.

approved grants totalling \$ 56.2 million, including the grant to ICCWC. The DGF program is planned to be implemented over three years, with additional funding to be requested from the DGF for the coming two years¹⁶³.

4.13 The Role Played by NGOs

The role of NGOs is crucial to the success of CITES and they have always particularly active in it¹⁶⁴. As already anticipated, the NGOs that are technically qualified in protection, conservation, or management of wild fauna and flora¹⁶⁵ can assist the CITES Secretariat by being contracted to carry out specific tasks, such as developing technical studies or even funding them. By way of example, the 2011 checklist of CITES species has been compiled by UNEP-World Conservation Monitoring Center¹⁶⁶.

NGOs are also an important source of information on compliance. The information enters directly through reports from NGOs to the Secretariat, and indirectly in reports from States to the Secretariat that are based on NGO information. By way of example, since its founding TRAFFIC has collected information on illegal wildlife trade and transmitted it to the Secretariat and National Authorities¹⁶⁷.

Furthermore, NGOs can participate in the COP and permanent committees meetings as ‘observers’.

As to the participation in COPs¹⁶⁸, the Convention, as well as the Rules of procedure¹⁶⁹ and COP Decisions govern accreditation to these meetings. The topic of NGOs participation was considered in the lead up to the eleventh COP¹⁷⁰. Art. XI(7) of the Convention states that

“any body or agency technically qualified in protection, conservation, or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object: (a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and (b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located. Once admitted, these observers shall have the right to participate but not to vote”.

¹⁶³ http://www.cites.org/eng/news/pr/2012/20120725_ICCWC_toolkit.php. Accessed February 13, 2014.

¹⁶⁴ See, particularly, the study conducted by Ecologic - Institute for International and European Environmental Policy and by Foundation for International Environmental Law and Development, “Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience”, available online. Accessed August 13, 2013. http://www.ecologic.eu/download/projekte/1850-1899/1890/report_ngos_en.pdf. See also Astrid Epiney, “The Role of NGOs in the Process of Ensuring Compliance with MEAs”, in *Ensuring Compliance with Multilateral Environmental Agreements*, ed. Ulrich Beyerlin et al. (Leiden, Boston: Martinus Nijhoff Publishers, 2006), 319-352.

¹⁶⁵ Art. XII(1).

¹⁶⁶ Accessed August 13, 2013. http://www.cites.org/eng/resources/pub/checklist11/CITES_species_index.pdf

¹⁶⁷ Reeve, *Policing International Trade*, 68 and White, *What is to be Done*, 461-464.

¹⁶⁸ See, e.g., Doc. 11.16, *Recognition of the Important Contribution Made by Observers to the CITES Process at Meetings of the Conference of the Parties*. Accessed August 13, 2013. <http://www.cites.org/eng/cop/11/doc/16.pdf>.

¹⁶⁹ See Rule 2. Accessed August 13, 2013. <http://www.cites.org/eng/cop/E14-Rules.pdf>.

¹⁷⁰ *Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience*, 146.

Therefore, NGOs may attend all plenary and committee sessions, and comment in these sessions on any of the issues. However, they are not permitted to vote on proposals. An NGO applying for observer status should provide materials with its application that detail how it meets these requirements of being technically qualified in protection, conservation, or management of wild fauna and flora. It should also include copies of its charter and bylaws, as well as a list of representatives it intends to send to the meetings¹⁷¹. It has been noted that the differentiation between the treatment of international and national NGOs, in so far as the latter have to submit evidence of the approval of the State in which they are located, does appear in some other wildlife treaties but not in more recent treaties. However, in practice the differentiation has not prevented many national NGOs from being accredited¹⁷².

The participation of NGOs in the Standing Committee meetings is more limited. These meetings in fact tend to be closed to NGOs observers, which can be invited to attend only for the discussion on particular agenda points¹⁷³.

As to the participation in the Animals and Plants Committee, it is provided that the Chairman can invite any organisation to participate without having the right to vote. In practice, any NGO that has indicated a desire to attend has been invited¹⁷⁴.

4.14 The Role Played by the European Union

The European Union is one of the largest global markets for wildlife trade, with imports ranging from tropical timber to reptile skins, caviar, orchids and traditional medicines¹⁷⁵. Nevertheless, the EU is not yet a Party to the CITES Convention. The EU has an observer status in the COPs¹⁷⁶ and in the other permanent committees meetings, where all the powers and the rights of the Parties under the Convention are exercised by the EU Member States – that are Parties to the Convention – ‘in the interest’ of the European Union, as it will be explained further on. Although the EU is not a Party to the Convention, the ECJ has to take it into account when interpreting the provisions of the Regulation.

In 1983 during the second extraordinary COP it was agreed to amend Art. XXI of CITES, dealing with accession, in order to allow “regional economic integration organizations constituted by sovereign States which have competence in respect of the negotiation, conclusion and implementation of international agreements in matters transferred to them by their Member States and covered by this Convention” to accede to the Convention. This amendment entered into force on the 29th of November 2013, 60 days after 54 (two-thirds) of the 80 States that were party to CITES on 30 April 1983 deposited their instrument of acceptance of the amendment. At that time it entered into force only for those States that had accepted the amendment. The amended text of the Convention will apply automatically to any State that becomes a Party after 29 November 2013. For States that became party to the Convention before that date and have not accepted the amendment, it will enter into force 60 days after they accept it¹⁷⁷ - if they choose to do so. This issue raises a very interesting and difficult legal problem. Given that the provision allowing the EU to join is not in force for all parties: if the EU accedes, what is the relation between the EU and those parties

¹⁷¹ “The Process of Becoming an Observer at CITES Meetings”. Accessed August 13, 2013. <http://www.fws.gov/international/pdf/factsheet-become-observer-to-cites-meeting-2003.pdf>.

¹⁷² *Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience*, 147.

¹⁷³ See Rule 26 of the Rules of Procedure of the Standing Committee. Accessed August 13, 2013. <http://www.cites.org/eng/com/sc/rules.pdf>.

¹⁷⁴ See e.g. Rule 7 of the Rules of Procedure for Meetings of the Animals Committee. Accessed August 13, 2013. <http://www.cites.org/eng/com/ac/E-AC23-RoP.pdf>. *Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience*, 155.

¹⁷⁵ Stephanie Theile, Attila Steiner, Katalin Kecse-Nagy, *Expanding Borders: New Challenges for Wildlife Trade Controls in the EU* (TRAFFIC, 2004), 1; Engler and Jones, *Opportunity or Threat*, 8.

¹⁷⁶ Art. XI(7)(a).

¹⁷⁷ See the dedicated website. Accessed January, 2014. <http://www.cites.org/eng/disc/parties/gaborone.php>.

that have not accepted the amendment? Strictly speaking those parties never agreed to the EU becoming (and thus being) a Party. Thus: will the EU legal be a Party *vis-a-vis* those Parties?

Because of the very recent entering into force of the amendment, the EU is still not a party to the Convention. Nevertheless, the European Union has already implemented unilaterally the provisions of CITES: first, through Regulation 3626/82¹⁷⁸ and, later, by Regulation 338/97 on the protection of species of wild fauna and flora by regulating trade therein¹⁷⁹. The Regulation 338/97 has been substantially amended several times in order to follow the amendments made to the Appendices of the CITES Convention¹⁸⁰.

These two Regulations are directly applicable in all Member States and do not have to be transposed into national law. However, the necessary enforcement provisions, including the measures to penalize the violations, must be transposed into national legislation and supplemented with national laws, as these are matters that remain under the sovereignty of each Member State which must ensure that infractions are punished in an appropriate manner.

The unilateral implementation of the Convention by the EU provided the European Union Court of Justice (ECJ) with jurisdiction over CITES matters in the EU, enabling it to adjudicate serious infractions. By way of example, in a case brought by the European Commission against France, the Court held that France had failed to fulfill its obligation under the Regulation by issuing import permits for 6.000 wildcat skins from Bolivia. An important element of the judgment was that the COP had adopted Resolution Conf. 5.2 requesting that Parties refuse such shipments¹⁸¹.

4.14.1 The Regulation 338/97

The Regulation 338/97 sets out four different protection regimes. Annex A corresponds to Appendix I of CITES; Annex B to Appendix II; Annex C to Appendix III, while Annex D contains species whose levels of import are monitored and which are not listed in one of the CITES Appendices. In this respect the Regulation has a wider scope than CITES¹⁸². Furthermore, some species that are listed in Appendix II of CITES are listed in Annex A of the Regulation (this applies to 104 animal species and 11 plant species).

It should be noted that the Regulation only applies to trade with third Countries and does not affect the free movement of goods within the EU. Therefore, no permits or certificates are needed for the commercial use or the keeping or moving of a specimen of a species listed in Annexes B, C or D inside the EU, whereas species listed in Annex A are generally not permitted in trade for commercial purposes and their

¹⁷⁸ *OJ L 384, 31.12.1982, p. 1*. In legal doctrine see, particularly, Thomas D. Mosedale, William C. Burns, "European Implementation of CITES and the Proposal for a Council Regulation (EC) on the Protection of Species of Wild Fauna and Flora" *Georgetown International Environmental Law Review* 9 (1997): 389-433 and Reeve, *Policing International Trade*, 112-120.

¹⁷⁹ *OJ L 61, 3.3.1997, p. 1-69*. In addition to this "core legislation", it has to be mentioned: Commission Regulation (EC) No 865/2006 (as amended by Commission Regulation (EC) No 100/2008, Commission Regulation (EU) No 791/2012 and Commission Implementing Regulation (EU) No 792/2012) laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97, and the Commission Implementing Regulation (EU) No 792/2012 of 23 August 2012 laying down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating the trade therein and amending Regulation (EC) No 865/2006. Furthermore, a Suspensions Regulation is in place to suspend the introduction into the EU of particular species from certain countries. Accessed August 9, 2013. http://ec.europa.eu/environment/cites/legislation_en.htm.

¹⁸⁰ Last amended by Commission Regulation (EU) No 101/2012, *OJ L 39, 11.2.2012, p. 133*. See the new *Proposal for a Regulation of the European Parliament and of the Council on the protection of species of wild fauna and flora by regulating trade therein (Recast)*, COM(2012) 403 final — 2012/0196 (COD).

¹⁸¹ C-182/89 *Commission of the European Communities v French Republic* [1990] ECR I-04337.

¹⁸² Jan H Jans and Hans H. B. Vedder, *European Environmental Law* (Groningen: Europa Law Publishing, 2012, 4th edition), 518. See "The Differences between EU and CITES Provisions in a Nutshell". Accessed August 9, 2013. http://ec.europa.eu/environment/cites/pdf/differences_b_eu_and_cites.pdf.

movement inside the EU is subject to specific regulations. Only captive-bred individuals are allowed in commercial trade and only if an EU sales exemption certificate ('Article 10' certificate) issued by the relevant CITES Management Authority accompanies the specimens. In addition, all live and captive-bred vertebrate species listed in Annex A that are used for commercial purposes have to be 'uniquely marked', for example with a microchip implant for reptiles and mammals or a closed ring for birds. The details of the mark will be specified on the Article 10 certificate. Consequently, the certificate is only valid for a specific individual. The combination of a unique and unchangeable mark and a specimen-specific certificate allows for the easy identification and the establishment of the legality of an Annex-A specimen. However, certain specimens, such as juvenile tortoises or snakes, cannot be marked with microchips until they have reached a certain size. In these cases, a new certificate is needed for each sales transaction¹⁸³.

The import into EU of Annex A and B species is subject to completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import permit issued by a management authority of the Member State of destination (Art. 4(1) and (2)).

The import of Annex C and D species is only subject to completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import notification (Art. 4(3) and (4))¹⁸⁴. However, the Regulation has stricter import conditions than those imposed by CITES and it can authorize the EU to suspend imports of species from particular exporting Countries, even if trade is allowed under CITES¹⁸⁵.

Any permit or certificate issued under the Regulation may stipulate conditions and requirements to ensure compliance with its provisions (Art. 11(3)). Permits and certificates issued by the competent authorities of the Member States are valid throughout the EU (Art. 11(1)). This does not however limit their power to adopt or maintain stricter measures. Member States are required to recognize the rejection of applications by the competent authorities of the other member States, where such rejection is based on the provisions of the Regulation. However, this need not apply where the circumstances have significantly changed or where new evidence to support an application has become available (Art. 6(4)). The export or re-export of Annex A, B and C species also requires a permit, which may be issued only when certain conditions have been met (Art. 5). Furthermore, the Regulation provides for derogations (Art. 7), provisions relating to the control of commercial activities (Art. 8), movement of life specimens (Art. 9) and monitoring of compliance and investigation of infringements (Art. 14)¹⁸⁶. Competent Member State Authorities are obliged to monitor and ensure compliance with the Regulation, to instigate legal action in cases of infringements, and to inform the Commission (and the CITES Secretariat) of significant infringements and the outcome of investigations. The Commission is obliged to draw Member States' attention to matters needing investigation¹⁸⁷.

The CITES Regulation also establishes a Scientific Review Group consisting of the representatives of each member State's Scientific Authority and chaired by the representative of the Commission (Art. 17)¹⁸⁸. This Group examines any scientific question relating to the application of the Regulation. The Commission is assisted in its work by the Committee on Trade in Wild Fauna and Flora, which is composed of representatives from Member State Management Authorities and chaired by the Commission (Article 18)¹⁸⁹. Many of the Articles of the Regulation refer to implementation measures to be adopted by the Commission in accordance with the Committee's procedures. Proposals for such measures require a positive opinion established by a 'qualified majority' from the Committee. If the Committee is unable to give a positive opinion, the Commission must immediately submit its proposal to the Council. The Committee meets between three and four times a year in Brussels.

¹⁸³ Theile, Steiner, Kecse-Nagy, *Expanding Borders*, 4-5.

¹⁸⁴ Jans and Vedder, *European Environmental Law*, 519.

¹⁸⁵ Theile, Steiner, Kecse-Nagy, *Expanding Borders*, 3-4.

¹⁸⁶ Jans and Vedder, *European Environmental Law*, 519-520.

¹⁸⁷ Reeve, *Policing International Trade*, 117.

¹⁸⁸ Accessed August 9, 2013. http://ec.europa.eu/environment/cites/srg_en.htm.

¹⁸⁹ Accessed August 9, 2013. http://ec.europa.eu/environment/cites/ctwff_en.htm.

The Regulation also established an Enforcement Group consisting of representatives of each of the Member State's authorities that have responsibility for monitoring compliance with the Regulations, such as Customs, Police and Wildlife Inspectorates¹⁹⁰. The Group, chaired by the European Commission, monitors the enforcement of wildlife trade policy and practice in the EU Member States and make recommendations to improve the enforcement of wildlife trade legislation. It also catalyzes the exchange of information, experience and expertise on wildlife trade control related topics between the Member States (trends in illegal trade, significant seizures and investigations), including sharing of intelligence information and establishing and maintaining databases. The group meets on average twice a year in Brussels.

The CITES Regulation obliges the Member States to have an adequate legislation on sanctions and to take measures to ensure the imposition of sanctions (Art. 16). A minimal list of 13 infringements requiring imposition of penalties is included, with an obligation that penalties be appropriate to the nature and gravity of the infringement. This is unusual, since the EU legislation usually leaves it to Member States to define sanctions.

Art. 16 states that

“ 1. Member States shall take appropriate measures to ensure the imposition of sanctions for at least the following infringements of this Regulation:

(a) introduction into, or export or re-export from, the Community of specimens without the appropriate permit or certificate or with a false, falsified or invalid permit or certificate or one altered without authorization by the issuing authority;

(b) failure to comply with the stipulations specified on a permit or certificate issued in accordance with this Regulation;

(c) making a false declaration or knowingly providing false information in order to obtain a permit or certificate;

(d) using a false, falsified or invalid permit or certificate or one altered without authorization as a basis for obtaining a Community permit or certificate or for any other official purpose in connection with this Regulation;

(e) making no import notification or a false import notification;

(f) shipment of live specimens not properly prepared so as to minimize the risk of injury, damage to health or cruel treatment;

(g) use of specimens of species listed in Annex A other than in accordance with the authorization given at the time of issuance of the import permit or subsequently;

(h) trade in artificially propagated plants contrary to the provisions laid down in accordance with Article 7(1)(b);

(i) shipment of specimens into or out of or in transit through the territory of the Community without the appropriate permit or certificate issued in accordance with this Regulation and, in the case of export or re-export from a third country party to the Convention, in accordance therewith, or without satisfactory proof of the existence of such permit or certificate;

(j) purchase, offer to purchase, acquisition for commercial purposes, use for commercial gain, display to the public for commercial purposes, sale, keeping for sale, offering for sale or transporting for sale of specimens in contravention of Article 8;

(k) use of a permit or certificate for any specimen other than one for which it was issued;

(l) falsification or alteration of any permit or certificate issued in accordance with this Regulation;

(m) failure to disclose rejection of an application for a Community import, export or re-export permit or certificate, in accordance with Article 6 (3).

2. The measures referred to in paragraph 1 shall be appropriate to the nature and gravity of the infringement and shall include provisions relating to the seizure and, where appropriate, confiscation of specimens.

¹⁹⁰ Accessed August 9, 2013. http://ec.europa.eu/environment/cites/eg_en.htm.

3. Where a specimen is confiscated, it shall be entrusted to a competent authority of the Member State of confiscation which:

(a) following consultation with a scientific authority of that Member State, shall place or otherwise dispose of the specimen under conditions which it deems to be appropriate and consistent with the purposes and provisions of the Convention and this Regulation; and

(b) in the case of a live specimen which has been introduced into the Community, may, after consultation with the State of export, return the specimen to that State at the expense of the convicted person.

4. Where a live specimen of a species listed in Annex B or C arrives at a point of introduction into the Community without the appropriate valid permit or certificate, the specimen must be seized and may be confiscated or, if the consignee refuses to acknowledge the specimen, the competent authorities of the Member State responsible for the point of introduction may, if appropriate, refuse to accept the shipment and require the carrier to return the specimen to its place of departure”.

With regard to the provisions on criminal offences and sanctions, as introduced by the Directive 2008/99/EC, see the European level report.

4.14.2 The Interactions between the CITES Convention and the CITES Regulation

The CITES Regulation states that it “shall apply in compliance with the objectives, principles and provisions of the Convention” (Art. 1). The ECJ has consistently maintained this approach considering that the provisions of the Regulation are to be interpreted in light of the CITES Convention. In the *Nilsson* case (dealing with the interpretation of, among others, the terms ‘worked specimens’ and ‘acquired’ contained in the Regulation 338/97) the ECJ stated that

“It should be borne in mind that the second paragraph of Article 1 of Regulation No 338/97 provides that that regulation is to apply in compliance with the objectives, principles and provisions of CITES. Although the Community is not a party to that convention, the Court cannot disregard those elements, in so far as they have to be taken into account in order to interpret the provisions of that regulation (see Case C-510/99 Tridon [2001] ECR I-7777, paragraph 25)”¹⁹¹.

This approach has been upheld by the ECJ also in order to justify the member States’ right to enact stricter measures to protect endangered species of fauna. In the *Tridon* case the ECJ established that an absolute prohibition of trade in captive-born and -bred specimens of species included in Appendix I (i.e. the most endangered species subject to the strictest protective regime) was lawful under CITES Article XIV(1)(a), notwithstanding that pertinent EU legislation was clearly in favor of a more relaxed regime in respect of those specimens¹⁹².

However, until the EU will become a Party to the Convention (i.e. until the CITES Convention will become binding upon the EU), the ECJ cannot use it as a condition of lawfulness for EU secondary legislation, as it has been confirmed in the *Intertanko* decision *vis-à-vis* the similar case of MARPOL¹⁹³. In fact, CITES and

¹⁹¹ C-154/02 *Nilsson* [2003] ECR I-12733, para. 39.

¹⁹² C-510/99 *Tridon* [2001] ECR I-7777, paras. 36-40.

¹⁹³ On this point see, particularly, Riccardo Pavoni, “Controversial Aspects of the Interaction Between International and EU Law in Environmental Matters: Direct Effect and Member States’ Unilateral Measures”, in *The External Environmental Policy of the European Union*, ed. Elisa Morgera (Cambridge: Cambridge University Press, 2012), 367-368. See also, Valsamis Mitsilegas, “The European Union and the Globalisation of Criminal law, *Cambridge Yearbook of European Legal Studies* 12 (2009-2010): 400-406.

MARPOL¹⁹⁴ are typical examples of treaties to which basically all Member States are Party. However after the entry into force of the Gaborone amendment the EU can ratify CITES¹⁹⁵.

4.14.3 Participating in the Union's Interest

Although the EU is not a Party to the Convention, the existence and extent of EU legislation in the fields covered by this treaty gives the EU Member States the possibility to actively participate in its meetings as 'trustees of the Union's interest'¹⁹⁶. This means that the common position of the EU can be expressed by the Member States acting jointly in the interest of the Union and in a manner consistent with the requirement of unity in the external representation of the Union itself¹⁹⁷.

By way of example, if the EU considers that a certain species may become threatened globally with extinction unless international trade is subject to strict regulation in order to avoid utilization incompatible with its survival, it can propose an amendment to the CITES Appendices. In February 2012 the European Commission, relying on Art. 192(1) and Art. 207 in conjunction with Art. 218(9) TFEU, submitted a proposal for a Council Decision on the submission by the EU of an amendment in order to include in Appendix III the porbeagle (*Lamna nasus*), which is particularly vulnerable to overfishing¹⁹⁸. The proposal has been formally adopted by the Council in May 2012 and a joint submission for inclusion of *Lamna nasus* in Appendix III to the CITES Convention has been sent to the CITES Secretariat by the Member State holding the Presidency of the Council of the European Union – acting as a representative of the Member States in the interest of the Union¹⁹⁹. This amendment affects the Union legislation concerned²⁰⁰ as any export of porbeagle from the Union has to be accompanied by an export permit attesting the legality of the catch. Other types of trade (export into the Union, or trade between non-Union Parties) require that a certificate of origin be produced by the exporting Country.

¹⁹⁴ See the status of ratification of the MARPOL Convention. Accessed August 9, 2013. <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

¹⁹⁵ Pavoni, *Controversial Aspects*, 368, footnote 90.

¹⁹⁶ Marise Cremona "Member States as Trustees of the Community Interest: Participating in International Agreements on Behalf of the European Community", *European University Institute Working Papers LAW* (2009/17): 8-14.

¹⁹⁷ On 'unity of international representation', see, among others, Frank Hoffmeister, "The Contribution of EU Practice to International Law", in *Developments in EU External Relations Law*, ed. Marise Cremona (Oxford: Oxford University Press, 2008), 47-54; Id., "Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States", ed. Christophe Hillion and Panos Koutrakos (Oxford: Hart Publishing, 2010); Piet Eeckhout, *EU External Relations Law* (Oxford: Oxford University Press, 2011), 255-264; Kati Kulovesi and Marise Cremona, "The Evolution of EU Competences in the Field of External Relations and its Impact on Environmental Governance Policies", *Transworld Working Paper* 17 (2013): 8-9; Louise G. van Schaik, *EU Effectiveness and Unity in Multilateral Negotiations, More Than the Sum of its Parts?* (Palgrave Macmillan, 2013), 54-69.

¹⁹⁸ *Proposal for a Council Decision on the Submission by the European Union of an amendment of Appendix III to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, Brussels, 13.2.2012, COM(2012) 44 final, 2012/0020 (NLE). See *supra* the procedure for amending Annex III. As to the inclusion of the porbeagle also in Annex II of the Convention, the entry into effect of the inclusion is delayed by 18 months to enable Parties to resolve related technical and administrative issues. See the updated list of proposals to amend Appendices I and II and CITES Secretariat's Recommendations. Accessed August 9, 2013. <http://www.cites.org/eng/cop/16/doc/E-CoP16-77-A1.pdf>.

¹⁹⁹ COM(2012) 44 final, 2012/0020 (NLE). For further details see the CITES Convention website. Accessed August 9, 2013. <http://www.cites.org/eng/cop/16/prop/E-CoP16-Prop-44.pdf>.

²⁰⁰ Council Regulation (EU) No 57/2011 prohibiting fishing for porbeagle; Council Regulation (EC) No 1224/2009 setting out measures for control, enforcement and sanction against infringements to the rules of the EU Common Fisheries Policy and Council Regulation (EC) No 1005/2008 setting out the rules applying to imports of fishing products into the EU.

4.14.4 EU Promoting Compliance with CITES

Implementation and enforcement of CITES are one of the priorities of the EU external environmental policy²⁰¹. The EU has criticized the failure to comply with CITES requirements which not only result in biodiversity loss and this is especially the case of illegal trade in ivory and rhinoceros horns which is at its highest level in a decade. This case will be subject to an in-depth study in WP4.

The EU has proposed “strengthening enforcement and imposing truly deterrent sanctions against those involved in poaching, and that illegal trade should be the first priority in range States, transit States and States of final destination”²⁰². However the European Union has not followed the pattern of using the non-compliance mechanism, but has opened consultations with other Parties. The EU consults with Asian states on concerns over both elephants and rhinoceros and their derivatives and by-products, often sold to Asian Countries. The EU had been in discussions with a number of these countries, particularly China and Vietnam, in order to try to address some of the misconceptions and misinformation, and to find some viable solutions. Negotiations are therefore ongoing²⁰³.

To ensure promoting compliance with MEAs, the EU adopted in 2008²⁰⁴ a new System of Generalized Preferences which provides a special incentive arrangement for sustainable development and governance. This arrangement was renewed in 2011. These incentives are granted to those developing countries that have ratified and effectively implemented MEAs, including the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Persistent Organic Pollutants, the Convention on Biodiversity and its Cartagena Protocol on Biosafety, the UNFCCC and the Kyoto Protocol, CITES and the Basel Convention on the Control of Transboundary movements of Hazardous wastes and their Disposal. States that have applied for and obtained this new incentive system are Armenia, Azerbaijan, Bolivia , Colombia , Costa Rica , Ecuador , Georgia, Guatemala , Honduras, Sri Lanka , Mongolia, Nicaragua , Peru , Paraguay and El Salvador.

Through this system of incentives the EU has promoted and controlled the enforcement of CITES and the Basel Convention on these states first controlling the status of ratification and acceptance of the

²⁰¹ The Commission has just started a consultation on how the EU can fight against dramatic increase in wildlife trafficking. See http://europa.eu/rapid/press-release_IP-14-123_en.htm. Accessed February 7, 2014.

²⁰² Council Regulation (EU) No 57/2011, Council Regulation (EC) No 1224/2009 and Council Regulation (EC) No 1005/2008.

²⁰³ As exposed by the Irish Minister for European Affairs, President-in-Office of the Council, before the European Parliament in response to the questions See “Summary record of the plenary session of the European Parliament held in Strasbourg on Oral Question. Preparation for CITES COP 16”, *Doc. 6160/13*, 7.02.2013, p. 3.

²⁰⁴ Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, *OJ L 211*, 6.8.2008.

jurisdiction of monitoring bodies of these conventions²⁰⁵ as well as their compliance²⁰⁶. This system was reformed in 2012 and the reforms will enter in force in 2014²⁰⁷.

Every two years, the Commission presents to the European Parliament and the Council a report on the status of ratification of these respective conventions, the compliance of the beneficiary countries with any reporting obligations under those conventions, and the status of the implementation of the conventions in practice. For the purposes of the monitoring and the withdrawal of preferences, reports from relevant monitoring bodies are essential. However, such reports may be supplemented by other sources of information, provided that they are accurate and reliable. Without prejudice to other sources, this could include information from civil society, social partners, the European Parliament and the Council.

The reasons for temporary withdrawal should include serious and systematic violations of the principles laid down in certain international conventions concerning core human rights and labour rights or related to the environment or good governance, so as to promote the objectives of those conventions and to ensure that no beneficiary country receives unfair advantage through continuous violation of those conventions.

In the case of Bolivia, Colombia, Costa Rica, Nicaragua and Panama the EU has determined whether they have ratified the CITES convention and have enacted legislation that is believed to generally meet the requirements of its implementation.

Some of these countries such as Bolivia, Ecuador, Georgia, Sri Lanka, Peru, El Salvador and Venezuela are under review by the CITES Secretariat and are not yet believed to fully meet all the requirements for the implementation of CITES²⁰⁸. They are also under the scrutiny of the CITES Standing Committee but have not been determined by that body as being non-compliant and are considered to be making progress²⁰⁹.

In the cases of Colombia, Georgia, Guatemala, Sri Lanka, Panamá, Perú and Venezuela, these state parties have yet to comply with Article VIII, paragraph 7 of CITES which requires each Party to submit a biennial report on legislative, regulatory and administrative measures taken to enforce the Convention but in addition these same countries have some shortcomings in terms of reporting under MEAs.

In the case of Moldova and Mongolia, their implementing legislation is under review by the CITES Secretariat and is not yet believed to fully meet all the requirements but the CITES Standing Committee has not identified them as requiring attention.

²⁰⁵ Report on the status of ratification and recommendations by monitoring bodies concerning conventions of annex III of the Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences (the GSP regulation) in the countries that were granted the Special incentive

arrangement for sustainable development and good governance (GSP+) by Commission Decision of 21 December 2005, Doc. 14851/08, ADD 1, 28 October 2008.

²⁰⁶ Commission staff working document Impact assessment. Accompanying the document proposal for a regulation of the European Parliament and of the council applying a Scheme of Generalised Tariff Preferences, SEC(2011) 536 final vol. II, 12 May 2011.

²⁰⁷ See Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012, applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L 303, 31.10.2012, in p. 6.

²⁰⁸ Under category 2. See Annex 2 of the latest report on national law for the implementation of the Convention: <http://www.cites.org/eng/cop/14/doc/E14-24.pdf>.

²⁰⁹ See Annex 2 of the latest report on national law for the implementation of the Convention:

<http://www.cites.org/eng/cop/14/doc/E14-24.pdf>) and pp. 27-28 of the Summary record of the 54th meeting of the Standing Committee: <http://www.cites.org/eng/com/SC/54/E54-SumRec.pdf>

5 International Convention for the Prevention of Pollution from Ships (MARPOL)²¹⁰

5.1 Introduction

MARPOL 73/78 is the main international Convention regulating pollution from vessels. The MARPOL Convention is one of the international legal responses that have been adopted after the occurrence of severe accidental releases of oil and other substances from ships²¹¹. Among these the 1967 *Torrey Canyon incident* raised questions about the existing measures to prevent oil pollution from ships and revealed drawbacks of the system for compensation resulting from incidents at sea²¹².

The MARPOL Convention was first adopted at the International Conference on Marine Pollution convened by the International Maritime Organisation (IMO)²¹³ in 1973 to replace the 1954 Oil Pollution Convention

²¹⁰ International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 61; 12 I.L.M. 1319 (1973) (MARPOL 73/78). Available online: <http://sedac.ciesin.columbia.edu/entri/texts/pollution.from.ships.1973.html>. Amended by: Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships.

²¹¹ See Damien Cremean and Erika J. Techera, "Marine Pollution Law", in *Routledge Handbook of International Environmental Law*, ed. Shawkat Alam et al.(London and New York: Routledge, 2013), 277-293.

²¹² In 1967, the *Torrey Canyon* ran aground while entering the English Channel and spilled her entire cargo of 120,000 tons of crude oil into the sea. See Patrick Griggs, "Torrey Canyon, 45 Years on: Have We Solved All the Problems?", in *Pollution at Sea: Law and Liability*, ed. Barış Soyer and Andrew Tettenborn (London: Informa), 3-10 and Julia Pfeil, "The Torrey Canyon", in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2006), 948.

²¹³ Protection of the environment was not the International Maritime Organisation's original mandate. Its main interest was maritime safety. However, in 1954 IMO has become the depository of the first 1954

for the Prevention of Pollution from Oil (OILPOL Convention). MARPOL 1973, the original treaty, was modified by the 1978 Protocol (MARPOL 1978) before the parent Convention entered into force²¹⁴. The combined instrument entered into force on 2 October 1983. The umbrella treaty and two first mandatory Annexes (see further below) have 152 parties (as of December 2013).

5.2 General Structure

The International Convention for the Prevention of Pollution from Ships (MARPOL) is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes.

The MARPOL Convention was adopted on 2 November 1973 at IMO. The Protocol of 1978 was adopted in response to a spate of tanker accidents in 1976-1977. As the 1973 MARPOL Convention had not yet entered into force, the 1978 MARPOL Protocol absorbed the parent Convention. The combined instrument entered into force on 2 October 1983. In 1997, a Protocol was adopted to amend the Convention and a new Annex VI was added which entered into force on 19 May 2005. MARPOL has been updated by amendments through the years.²¹⁵

The Convention includes regulations aimed at preventing and minimizing pollution from ships - both accidental pollution and that from routine operations - and currently includes six technical Annexes. Special Areas with strict controls on operational discharges are included in most Annexes.

The MARPOL Convention incorporated much of the OILPOL Convention and its amendments into Annex I, covering oil, while other Annexes covered chemicals (Annex II), harmful substances carried in packaged form (Annex III), sewage (Annex IV) and garbage (Annex V). A Protocol was later adopted in 1997 to amend MARPOL and a new Annex VI on Air Pollution was added²¹⁶. All Annexes have been amended several times; therefore their content has undergone radical changes. However, not all States parties have accepted all amendments which have resulted in an extremely complex nexus of differentiated obligations of States under these Annexes.

Convention for the Prevention of Pollution from Oil. Since then the protection of the marine environment has become one of the most important activities of the IMO. Among fifty one treaty instruments IMO has adopted so far, twenty one are directly environment-related (twenty three if we include the Salvage and Wreck Removal Conventions). The Marine Environment Protection Committee is the IMO's technical body in charge of marine pollution related matters (it is aided in its work by a number of Sub-Committees). Accessed 4 September 2013. <http://www.imo.org/Pages/home.aspx>.

²¹⁴ Sands, "Principles", 381. See also Andrew Griffin, "MARPOL 57/78 and Vessel Pollution: A Glass Half Full of Half Empty?", *Indiana Journal of Global Legal Studies*, 1 (1994): 489-513; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford: Oxford University Press, 2009), 403-413; Thomas A Mensah "Marine Pollution from Ships, Prevention of and Responses to", in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2011); Wang Hui, "Prevention and Compensation for Marine Pollution", in *Maritime Pollution Liability and Policy, China Europe and the US*, ed. Michael G. Faure et al. (The Netherlands: Kluwer Law International, 2010), 18-28; Malgosia Fitzmaurice and Ruben Mazedo, "The International Convention for the Prevention of Pollution from Ships (MARPOL)" in *Manual on the Law of the Sea and Maritime Law, International Maritime Law Institute* (forthcoming).

²¹⁵ <http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-%28MARPOL%29.aspx> Accessed 13 February 2014.

²¹⁶ Annex I and II entered into force on 2 October 1982 and as of 31 July 2013 they have 152 Parties, Annex III entered into force on 1 July 1992 and as of 31 July 2013 it has 138 Parties, Annex IV entered into force on 27 September 2003 and as of 31 July 2013 it has 131 Parties, Annex V entered into force on 31 December 1988 and as of 31 July 2013 it has 144 Parties and Annex VI entered into force on 19 May 2005 and as of 31 July 2013 it has 72 Parties.

Apart from Annexes, the MARPOL has also two Protocols: Protocol I, Provisions concerning Reports on Incidents Involving Harmful Substances (in accordance with Art. 8 of the Convention); and Protocol II, on Arbitration. The amendments to MARPOL itself, the Protocols and Annexes are governed by Article 16 of the 1973 original Convention, which is very complex and combines a system of tacit approval (opting out) with express approval (opting in). The opting out system is based on a principle that a State party to the Convention may 'opt out' from accepting a new amendment within a prescribed period of time, and as a result is not bound by it. The procedure makes the application of the Convention (including the Annexes) very patchy and as observed by some authors it complicates the issue whether some particular regulation is 'generally accepted' for the flag State to apply in the sense of Article 211 of the UNCLOS²¹⁷. Under MARPOL the Parties undertake to give effect to the provisions of the Convention and those Annexes which bind them, in order to prevent pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention (Art. 1(1)).

5.3 Definitions and Exclusions

The definition of 'discharge' is broad and covers intentional and unintentional releases from ship, including "any escape, disposal, spilling, leaking, pumping emitting or emptying"; however, it does not include dumping within the meaning of the 1972 London Convention, releases directly arising from exploration and exploitation of seabed mineral resources, or releases for certain scientific research.

MARPOL 73/78 applies to ships that are entitled to fly the flag of a Party or which operate under the authority of a State and are used only on governmental non-commercial service. The MARPOL Convention in fact does not apply to any warship, naval auxiliary or other ship owned or operated by a State and used on government non-commercial service. However, the Convention imposed an obligation on these ships to act in a manner consistent with the Convention, as long as it is practicable. National governments and their agencies can be prodigious polluters provision excluding such entities, undermines the purpose of the MARPOL, and the insertion of 'the best efforts clause' (which means that Members' ships that can demonstrate genuine efforts to obtain compliant fuel should not be penalised) constitutes a weak attempt to ensure the States compliance. The 'best efforts clause' was the result of a compromise among the Parties to the MARPOL. The States argued that such vessels should not be subject to other States' inspection, as it would compromise national security. However, it is suggested that States can comply with the requirements of the Convention avoiding compromising national security, by assuming more responsibility for monitoring compliance (such as flag States could conduct an annual MARPOL inspection of their ships; or introduce a random inspection to which their ships would be subjected at any time). The existing provision appears to send a wrong message and should be changed to make it clear that these ships are not immune from MARPOL regulations²¹⁸.

With respect to ships of non-parties to the MARPOL Convention, the Parties are to apply such requirements as may be necessary to ensure that no more favourable treatment is given to such ships (Art. 5). The measures under Article 5 are the source of some doctrinal controversy in so far as they purport to apply to ships flying the flag of non-parties. As an exercise of jurisdiction of the coastal State over foreign ships, these provisions cannot, according to one of the authors, restrict the rights enjoyed by non-Parties under the general international law principle of *pacta tertiis nec nocent nec prosunt*²¹⁹.

As to the punishment of "any violations of the requirements of the Convention", Article 4 provides a double system of national prohibitions and sanctions. First, violations are to be prohibited and sanctions to be established under the law of the Administration of the ship concerned, wherever the violation occurs (Art. 4(1)); and, secondly, violations are to be prohibited and sanctions established under the law of the Party within whose jurisdiction they occur (Art. 4(2)) (on this see further below).

²¹⁷ Ibid.

²¹⁸ Rebecca Becker, "MARPOL 73/78: An Overview in International Environmental Enforcement", *The Georgetown International Environmental Law Review* 10 (1998): 635.

²¹⁹ Jan Willisch, *State Responsibility for Technological Damage in International Law* (Berlin: Duncker and Humblot, 1987), 115.

'Administration' means the Government of the State under whose authority the ship is operating. With respect to a ship entitled to fly a flag of any State, the Administration is the Government of that State. With respect to fixed or floating platforms engaged in exploration and exploitation of the sea-bed and subsoil thereof adjacent to the coast over which the coastal State exercises sovereign rights for the purposes of exploration and exploitation of their natural resources, the Administration is the Government of the coastal State concerned (Art. 2(5)).

5.4 The Annexes

Annex I: Prevention of Pollution by Oil: oil tankers transport some 2,400 million tonnes of crude oil and oil products around the world by sea safely due to measures introduced by the IMO ensuring that the majority of oil tankers are safely built and operated and are constructed in order to reduce the amount of oil spilled in the event of an accident. The technical designs of vessels are very strict. The rule in equipping new vessels with Segregated Ballast Tanks (SBT) is designed to eliminate the problem of discharging oily ballast as there are separate holds for water and oil. The cheaper variation of SBT is the Dedicated Clean Ballast Tanks (CBT) system, which operates on the basis of setting aside cargo tanks only for carrying ballast water. This system can be as effective as SBTs but only if the tanks are kept clean of oil²²⁰. There is also the Crude Oil Washings (COW) system, which is based on a use of oil in place of water to clean off the walls of cargo tanks. These two systems were permitted by Annex I for older vessels (Annex I is based on a sliding scale). Apart from the requirement of SBTs, Annex I require all vessels to have the equipment necessary to operate LOT²²¹ and to retain oily residues on board vessel until they can be discharged into port reception facilities. There is a requirement of State-Parties to MARPOL to provide adequate reception facilities for oil residues and oily mixtures at loading terminals, repair ports and other ports frequented by ships with oily residues to discharge²²².

Annex I also requires ships to be equipped with systems that can monitor and control oily discharges. All oil record books must be kept for at least three years. According to the IMO there are three categories of cargo monitoring systems: control units; computing units; and calculating units²²³. As in the case of SBTs, the monitoring equipment is based on a sliding scale: new tankers are obliged to have it installed²²⁴.

Annex I also includes an operational requirements, which must be monitored by the monitoring equipment. For oil tankers, standards are as follows: 1. a ship may not discharge more than 1/30, 000th of its total carrying capacity into ocean; 2. the rate at which oil that may be discharged must not exceed sixty litres per mile travelled by ship; and 3. no discharge of any oil can be made within fifty miles from the nearest land or in certain areas. For other vessels, the standards are not so restrictive: 1. the oil content of effluents must be less than 100 parts per million; and 2. no discharge can be made within 12 miles from the nearest land or in certain special areas²²⁵. All ships must carry on board oil record book in which all operations involving oil are recorded. This book may be inspected by authorities of any State-Party to MARPOL²²⁶.

²²⁰ Griffin, "MARPOL 57/78", 493.

²²¹ The procedure 'load-on-top' (LOT) has been developed by the oil industry for saving oil and reducing pollution. Under this mechanism washings resulting from tank cleaning are pumped into a special tank. During the voyage back to the loading terminal the oil and water separate. The water at the bottom of the tank is pumped overboard and at the terminal oil is pumped on to the oil left in the tank.

²²² Annex I, Reg. 12, 1350-56, Griffin, "MARPOL 57/78", 499.

²²³ *Ibid.*, 497.

²²⁴ *Ibid.*, 498.

²²⁵ Annex I, Reg. 9(1) b, 1344; Griffin, "MARPOL 57/78", 499.

²²⁶ Annex I, Reg. 20, 1359-61, Griffin, "MARPOL 57/78", 499.

The U.S.A. was the first State to legislate the phasing out of single hull tankers after the Exxon Valdez Accident in 1998²²⁷. Then, the IMO adopted in 1992 of a series of rules for double hull tankers. Double hull tankers of 5,000 dwt (or alternative design approved by the IMO)²²⁸ have become mandatory from 1993, following the 1992 *Erika incident* (regulation 13 F, at present regulation 19 of Annex I)²²⁹. Those standards require all tankers with deadweight up to 600 tons, delivered from 1996, are so constructed with a double hull or equivalent design. Consequently, from that date no longer hull tankers of this size are made. For single-hull tankers with deadweight up to 20,000 tons, MARPOL requires that conform to these standards in the double hull, no later than when they are 25 or 30 years ago, a system equally effective in practice to reduce the risk of contamination, but neither the European states and the European Union had adequate measures to prevent more accidents.

Following the *Prestige incident*, a new, stricter time-table introduced accelerated phase-out schedule for single hull tankers, adopted by the by MEPC resolution MEPC 111(50) and they entered into force for all Parties to MARPOL in 2005.

Furthermore another regulation related to the prevention of oil pollution from oil tankers regarding carrying of heavy grade oil (HGO) was introduced²³⁰. The new regulation banned the carriage of HGO in single-hull tankers of 5,000 tonnes dwt and above after the date of entry into force of the regulation (5 April 2005), and in single-hull oil tankers of 600 tonnes dwt and above but less than 5,000 tonnes dwt, not later than the anniversary of their delivery date in 2008.

Regulation 20 to Annex I (the previous regulation 13 G) allows the flag State to permit continued operation of category 2 (MARPOL tankers) and category 3 (relatively small tankers of less than 5,000 dwt) tankers beyond its phase-out date in accordance with the schedule subject to satisfactory results of the Condition Assessment Scheme (hereinafter the 'CAS'), but their continued operation must not go beyond the anniversary of the date of delivery of the ship in 2015 or the date on which the ship reaches 25 years of age after the date of its delivery, whichever is earlier²³¹.

²²⁷ <http://www.imo.org/OurWork/Environment/PollutionPrevention/OilPollution/Pages/Default.aspx>. See also, Caroline Stenman, "The Development of the MARPOL and the EU Regulations to Phase Out Single Hull Tankers", accessed September 5, 2013, <https://gupea.ub.gu.se/bitstream/2077/1941/1/200556.pdf>

²²⁸ Such as so-called 'mid-deck' under which the pressure within the cargo tank does not exceed the external hydrostatic water pressure. Tanker in such a design have a double sides but not a double bottom, instead of which they have a mid-deck installed inside the cargo tank with the venting arranged so that there is an upward pressure on the bottom of the hull.

²²⁹ This measure was adopted to be phased in over a number of years because shipyard capacity is limited and it would not be possible to convert all single hulled tankers to double hulls without causing immense disruption to world trade and industry.

²³⁰ The new regulation banned the carriage of HGO in single-hull tankers of 5,000 tons dwt and above after the date of entry into force of the regulation (5 April 2005), and in single-hull oil tankers of 600 tons dwt and above but less than 5,000 tons dwt, not later than the anniversary of their delivery date in 2008.

²³¹ In the case of certain Category 2 or 3 oil tankers fitted with only double bottoms or double sides not used for the carriage of oil and extending to the entire cargo tank length or tankers fitted with double hull spaces not meeting the minimum distance protection requirements, the Administration may allow continued operation beyond its phase-out date in accordance with the schedule, provided that the ship was in service on 1 July 2001, the Administration is satisfied by verification of the official records that the ship complied with the conditions specified and that those conditions remain unchanged (such continued operation must not go beyond the date on which the ship reaches 25 years of age after the date of its delivery). In the case of certain Category 2 or 3 tankers carrying HGO as cargo, fitted only with double bottoms or double sides, not used for the carriage of oil and extending to the entire cargo tank length, or tankers fitted with double hull spaces not meeting the minimum distance protection requirements which are not used for the carriage of oil and extend to the entire cargo tank length, the Administration, under certain conditions, may allow continued operation of such ships beyond 5 April 2005 until the date on which the ship reaches 25 years of age after the date of its delivery. Regulation 21 also allows for continued operation of oil tankers of 5,000 DWT and above, carrying crude oil with a density at 15°C higher than 900 kg/ m³ but lower than 945 kg/ m³, if satisfactory results of the Condition Assessment

It is very important to note that a Party to MARPOL can deny entry of single hull tankers which have been allowed to continue operation under the above exemptions, into the ports or offshore terminals under its jurisdiction.

The EU is not party to MARPOL. It is worth mentioning that the European Union adopted several regulations concerning the phasing out of single hull tankers in the so-called Erika law packages, which consists of a set of complex and extensive regulations (Erika I-III packages)²³². The original regulation 417/2002 was amended several times in order to accelerate further the phasing out for single hull tankers (on the EU and MARPOL see further below).

In broad strokes the gist of the EU phasing out regulation are as follows:

The regulation applies to all tankers of 5,000 dwt or above, which enter or leave a port or offshore terminal or anchor in an area under the jurisdiction of an EU country, irrespective of their flag, or which fly the flag of an EU country and to oil tankers of 600 dwt and above for the transport of the heavy grades of oil.

Single hulled oil tankers are not allowed to operate under the flag of an EU country, nor are they allowed to enter into ports or offshore terminals under the jurisdiction of an EU country after the anniversary of the date of delivery of the ship in the year specified below:

- For category 1 (Pre-Marpol) oil tankers: 2003 for ships delivered in 1980 or earlier; 2004 for ships delivered in 1981; 2005 for ships delivered in 1982 or later.
- For category 2 (Marpol tankers) and 3 (small) oil tankers: 2003 for ships delivered in 1975 or earlier; 2004 for ships delivered in 1976; 2005 for ships delivered in 1977; 2006 for ships delivered in 1978 and 1979; 2007 for ships delivered in 1980 and 1981; 2008 for ships delivered in 1982; 2009 for ships delivered in 1983; 2010 for ships delivered in 1984 or later.

The Condition Assessment Scheme (CAS) will be applied to all types of oil tanker which have reached 15 years of age by 2005 for category 2 and category 3 ships.

Scheme warrant that, in the opinion of the Administration, the ship is fit to continue such operation, having regard to the size, age, operational area and structural conditions of the ship and provided that the continued operation shall not go beyond the date on which the ship reaches 25 years after the date of its delivery. The Administration may allow continued operation of a single hull oil tanker of 600 DWT and above but less than 5,000 DWT, carrying HGO as cargo, if, in the opinion of the Administration, the ship is fit to continue such operation, having regard to the size, age, operational area and structural conditions of the ship, provided that the operation shall not go beyond the date on which the ship reaches 25 years after the date of its delivery. The Administration may exempt an oil tanker of 600 DWT and above carrying HGO as cargo if the ship is either engaged in voyages exclusively within an area under the Party's jurisdiction, or is engaged in voyages exclusively within an area under the jurisdiction of another Party, provided the Party within whose jurisdiction the ship will be operating agrees. The same applies to vessels operating as floating storage units of HGO. All information on IMO website. Accessed September 5, 2013.
<http://www.imo.org/OurWork/Environment/PollutionPrevention/OilPollution/Pages/constructionrequirements.aspx>

²³² Regulation (EC) No 417/2002, entry into force 27.3.2002, OJ L 64 of 7.3.2002; amending acts: Regulation (EC) No 2099/2002, entry into force 9.12.2002, OJ L 324 of 29.11.2002; Regulation (EC) No 1726/2003, entry into force 21.10.2003, OJ L 249 of 1.10.2003; Regulation (EC) No 457/ 2007, entry into force 20.5.2007, OJ L 113 of 30.4.2007; Regulation (EC) No 2192009, entry into force 20.5.2007; OJ L 113 of 30.4.2007; Regulation (EC) No 1163/2009, entry into force 21.12.2009, OJ L 314 of 1.12.2009. There was a difference between the Revised Regulation 13G and the Regulation 417/2002. The Regulation did not allow 'the continued operation, in accordance with paragraph 5 of the revised Regulation 13G of the Annex I to MARPOL 73/78, of Category (2) and Category (3) oil tankers under the flag of a Member State or 'the entry into ports of offshore terminals under the jurisdiction of a Member State of other Category (2) and Category (3) oil tankers, irrespective of the fact that they continue to operate the flag of a third State in accordance with paragraph 5 of the revised Regulation 13G of Annex I to MARPOL 73/78 (Article 7 of the Regulation 417/2002).

Annex II: Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk. It may be observed that regulations governing the carriage of chemicals by ship are also contained in the International Convention for the Safety of Life at Sea (hereinafter the 'SOLAS').

The marine pollution hazards of thousands of chemicals have been assessed by the Evaluation of Hazardous Substances Working Group, giving a resultant GESAMP Hazard Profile which indexes the substances taking into account their bio-accumulation; bio-degradation; acute toxicity; chronic toxicity; long-term health effects; and effects on marine wildlife and on benthic habitats.

According to standards prescribed by both Conventions chemical tankers built after 1 July 1986 have to comply with the International Bulk Chemical Code (hereinafter the 'IBC' Code). It prescribes international standards for the safe transport by sea in bulk of liquid dangerous chemicals, through the design and construction standards of ships involved in such transport and the equipment they should carry. These measures are designed to minimize the risks to the ship, its crew and to the environment, having regard to the nature of the products carried. Amendments to the IBC Code have been adopted, which resulted in the amendments to MARPOL Annex II. The said amendments incorporate revisions to the categorization of certain products relating to their properties as potential marine pollutants as well as revisions to ship type and carriage requirements following their evaluation by the Evaluation of Hazardous Substances Working Group.

Ships constructed after 1986 carrying substances identified in chapter 17 of the IBC Code must follow the requirements for design, construction, equipment and operation of ships contained in the Code.

Ship types should correspond to the hazard properties of the products covered by the Codes (such as flammability, toxicity, corrosivity and reactivity). To this effect the IBC Code lists chemicals and their hazards and gives both the ship type required to carry that product as well as the environmental hazard rating.

On the other hand, chemical tankers constructed before 1 July 1986 should comply with the requirements of the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (hereinafter the 'BCH' Code) which is the predecessor of the IBC Code²³³.

The Annex II Regulations for the control of pollution by noxious liquid substances in bulk define a four-category categorization system for noxious and liquid substances. The categories of noxious substances are:

- (i) Category X: Noxious Liquid Substances which, if discharged into the sea from tank cleaning or deballasting operations, are deemed to present a major hazard to either marine resources or human health and, therefore, justify the prohibition of the discharge into the marine environment;
- (ii) Category Y: Noxious Liquid Substances which, if discharged into the sea from tank cleaning or deballasting operations, are deemed to present a hazard to either marine resources or human health or cause harm to amenities or other legitimate uses of the sea and therefore justify a limitation on the quality and quantity of the discharge into the marine environment;
- (iii) (Category Z: Noxious Liquid Substances which, if discharged into the sea from tank cleaning or deballasting operations, are deemed to present a minor hazard to either marine resources or human health and therefore justify less stringent restrictions on the quality and quantity of the discharge into the marine environment; and
- (iv) Other Substances: substances which have been evaluated and found to fall outside Category X, Y or Z because they are considered to present no harm to marine resources, human health, amenities or other legitimate uses of the sea when discharged into the sea from tank cleaning of deballasting operations. The discharge of bilge or ballast water or other residues or mixtures containing these substances are not subject to any requirements of MARPOL Annex II²³⁴.

²³³ All information from the IMO website. Accessed September 5, 2013. <http://www.imo.org/OurWork/Environment/PollutionPrevention/ChemicalPollution/Pages/Default.aspx>

²³⁴ Ibid.

This Annex also includes a number of other requirements reflecting modern stripping techniques, which specify discharge levels of products which have been incorporated into Annex II²³⁵. The evaluation of noxious substances is an ongoing process. For example, vegetable oils which were previously categorized as being unrestricted are now required to be carried in chemical tankers²³⁶.

Annex III: Regulations for the Prevention of Pollution by Harmful Substances in Packaged Form. Annex III includes regulations for the prevention of pollution by harmful substances in packaged form and includes general requirements for the issuance of detailed standards on packing, marking, labelling, documentation, stowage, quantity limitations, exceptions and notifications for preventing pollution by harmful substances. Chemicals which are carried in packaged form, in solid form or in bulk are also regulated by Part A of SOLAS Chapter VII - Carriage of dangerous goods which includes provisions for the classification, packing, marking, labelling and placarding, documentation and stowage of dangerous goods.

The Parties to the Convention are required to issue instructions at the national level. The chapter refers to International Maritime Dangerous Goods Code (hereinafter the 'IMDG') developed by IMO, which is constantly updated to accommodate new dangerous goods and to supplement or revise existing provisions.

The IMDG Code was developed as a uniform international code for the transport of dangerous goods by sea (it deals with such matters as packing, container traffic and stowage, with particular reference to the segregation of incompatible substances). The IMDG Code includes products considered to be marine pollutants. IMO's Maritime Safety Committee (MSC) decided in principle, at its 73rd session in 2000, to make some parts of the IMDG Code mandatory²³⁷.

For the purpose of Annex III, 'harmful substances' are those identified as 'marine pollutants' in the IMDG Code²³⁸.

Annex IV: Sewage. This Annex contains the regulations regarding the discharge of sewage into the sea, ships' equipment and systems for the control of sewage discharge, the provision of facilities at ports and terminals for the reception of sewage, and requirements for survey and certification. It also includes a model International Sewage Pollution Prevention Certificate to be issued by national shipping administrations to ships under their jurisdiction²³⁹. The general principle is that on the high seas, the

²³⁵ For ships constructed on or after 1 January 2007 the maximum permitted residue in the tank and its associated piping left after discharge is set at a maximum of 75 litres for products in categories X, Y and Z (compared with previous limits which set a maximum of 100 or 300 litres, depending on the product category).

<http://www.imo.org/OurWork/Environment/PollutionPrevention/ChemicalPollution/Pages/Default.aspx>

²³⁶ An MEPC resolution on *Guidelines for the transport of vegetable oils in deep tanks or in independent tanks specially designed for the carriage of such vegetable oils on board dry cargo ships* was adopted in October 2004. It allows general dry cargo ships that are currently certified to carry vegetable oil in bulk to continue to carry these vegetable oils on specific trades. The guidelines took effect on 1 January 2007.

<http://www.imo.org/OurWork/Environment/PollutionPrevention/ChemicalPollution/Pages/Default.aspx>

²³⁷

<http://www.imo.org/OurWork/Environment/PollutionPrevention/ChemicalPollution/Pages/Default.aspx>

²³⁸

<http://www.imo.org/OurWork/Environment/PollutionPrevention/ChemicalPollution/Pages/Default.aspx>

²³⁹ All information from IMO website. Accessed September 5, 2013. <http://www.imo.org/OurWork/Environment/PollutionPrevention/Sewage/Pages/Default.aspx> This Annex entered into force in 2003. A revised Annex was adopted on 1 April 2004, with an entry into force date of 1 August 2005.

oceans are capable of assimilating and dealing with raw sewage through natural bacterial action and therefore the regulations in Annex IV of MARPOL regulates discharging sewage within a specified distance of the nearest land, unless they have in operation an approved treatment plant. Governments are required to ensure the provision of adequate reception facilities at ports and terminals for the reception of sewage.

The revised Annex will apply to new ships engaged in international voyages, of 400 gross tonnage and above or which are certified to carry more than 15 persons. Existing ships will be required to comply with the provisions of the revised Annex IV five years after the date of entry into force of Annex IV, namely from September 2008. The Annex requires ships to be equipped with either a sewage treatment plant or a sewage comminuting and disinfecting system or a sewage holding tank.

The discharge of sewage into the sea will be prohibited, except when the ship has in operation an approved sewage treatment plant or is discharging comminuted and disinfected sewage using an approved system at a distance of more than three nautical miles from the nearest land; or is discharging sewage which is not comminuted or disinfected at a distance of more than 12 nautical miles from the nearest land.

Revised sewage standards:

The MEPC, by the Resolution 159 (55) at its 55th session in 2006 adopted revised Guidelines on implementation of effluent standards and performance tests for sewage treatment plants. The revised Guidelines, which will apply to sewage treatment plants installed onboard on or after 1 January 2010, replace the Recommendation on international effluent standards and guidelines for performance tests for sewage treatment plants adopted by resolution MEPC.2 (VI) in 1976.

The MEPC also adopted a standard for the maximum rate of discharge of untreated sewage from holding tanks which is at a distance equal or greater than 12 nautical miles from the nearest land (see resolution MEPC.157 (55)).

Annex V: Garbage. Garbage poses danger to marine life as much as oil or chemicals²⁴⁰. In particular plastic is dangerous as it can float for years. Fish and marine mammals can in some cases mistake plastics for food and they can also become trapped in plastic ropes, nets, bags and other items - even such innocuous items as the plastic rings used to hold cans of beer and drinks together.

Rubbish comes from people on shore as well as from cities that dump rubbish into rivers or the sea. But in some areas most of the rubbish found comes from ships. The process of degradation can take months or years²⁴¹. MARPOL sought to eliminate and reduce the amount of garbage being dumped into the sea from ships.

Under Annex V of the Convention, garbage includes:

- (i) all kinds of food;
- (ii) domestic and operational waste, excluding fresh fish, generated during the normal operation of the vessel and liable to be disposed of continuously or periodically.

Annex V totally prohibits of the disposal of plastics anywhere into the sea, and severely restricts discharges of other garbage from ships into coastal waters and 'Special Areas'. The Parties to Annex have the duty to ensure the provision of reception facilities at ports and terminals for the reception of garbage.

Provisions to extend Port State Control (PSC) to cover operational requirements as regards prevention of marine pollution were adopted as a new regulation 8 to the Annex in 1994 (entering into force on 3 March 1996). PSC officers can inspect a foreign-flagged vessel and "where there are clear grounds for believing that the master or crew are not familiar with essential shipboard procedures relating to the prevention of pollution by garbage" can require the proper training of crew or on the extreme detain the ship.

A new regulation referring to implementation and enforcement was adopted in 1995. It requires all ships of 400 gross tonnage and above and every ship certified to carry 15 persons or more, and every fixed or

²⁴⁰ Accessed September, 2013.
13<http://www.imo.org/OurWork/Environment/PollutionPrevention/Garbage/Pages/Default.aspx>

²⁴¹ Paper bus ticket 2-4 weeks; cotton cloth 1-5 months; rope 3-14 months; woolen cloth 1 year; painted wood 13 years; tin can 100 years; aluminum can 200-500 years; plastic bottle 450 years. Accessed September 5, 2013.
<http://www.imo.org/OurWork/Environment/PollutionPrevention/Garbage/Pages/Default.aspx>

floating platform engaged in exploration and exploitation of the seabed to provide a Garbage Record Book and to record all disposal and incineration operations of garbage²⁴².

The regulations concerning garbage management are very strict:

- (i) all ships of 400 gross tonnage and above and every ship certified to carry 15 persons or more will have to carry a Garbage Management Plan (including written procedures for collecting, storing, processing and disposing of garbage, including the use of equipment on board. It should designate the person responsible for carrying out the plan and should be in the working language of the crew).
- (ii) MEPC/Circ.317 gives Guidelines for the development of garbage management plans and an Appendix to Annex V of MARPOL gives a standard form for a Garbage Record Book.

Regulation 9 came into force for new ships on 1 July 1997 and as from 1 July 1998 applicable to all ships built before 1 July 1997 making thus the standards even stricter²⁴³.

By the Resolution MEPC 76/40, the MEPC at its 40th Session in September 1997 adopted a Standard Specification for Shipboard Incinerators (covering the design, manufacture, performance, operation and testing of incinerators designed to incinerate garbage and other shipboard waste)²⁴⁴. The MEPC at its sixty second session in July 2011 considered the adoption of the amendments to Annex V and of the associated Revised Guidelines for the implementation of MARPOL Annex V.

Annex VI: The Regulations for the Prevention of Air Pollution from Ships. This Annex was added in 1997 in order to deal with local and global air pollution and environmental problems and to minimize emissions from ships (e.g. SO_x, NO_x, ODS, VOC)²⁴⁵. In 2007 international shipping was estimated to have contributed about 2.7% to the global emissions of carbon dioxide (CO₂). It prohibits deliberate emissions of ozone depleting substances. MARPOL Annex VI also regulates shipboard incineration, and the emissions of volatile organic compounds from tankers²⁴⁶.

²⁴² The date, time, position of ship, description of the garbage and the estimated amount incinerated or discharged must be logged and signed. The Garbage Record Book must be kept for a period of two years after the date of the last entry. This regulation does not in itself impose stricter requirements - but it makes it easier to check that the regulations on garbage are being adhered to as it means ship personnel must keep track of the garbage and what happens to it. It may also prove an advantage to a ship when local officials are checking the origin of dumped garbage - if ship personnel can adequately account for all their garbage, they are unlikely to be wrongly penalised for dumping garbage when they have not done so. See IMO website. Accessed September 5, 2013. <http://www.imo.org/OurWork/Environment/PollutionPrevention/Garbage/Pages/Default.aspx>

²⁴³ All ships of 400 gross tonnage and above and every ship certified to carry 15 persons or more, and every fixed or floating platform engaged in exploration and exploitation of the seabed. The regulation also requires every ship of 12 metres or more in length to display placards notifying passengers and crew of the disposal requirements of the regulation; the placards should be in the official language of the ship's flag State and also in English or French for ships travelling to other States' ports or offshore terminals. See IMO website. Accessed September 5, 2013. <http://www.imo.org/OurWork/Environment/PollutionPrevention/Garbage/Pages/Default.aspx>

²⁴⁴ Ibid.

²⁴⁵ Annex VI was adopted in 1997 and entered into force on 19 May 2005 and a revised Annex VI with stricter emissions limits was adopted in October 2008 which entered into force on 1 July 2010.

²⁴⁶ All information from IMO website. Accessed September 5, 2013. <http://www.imo.org/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Air-Pollution.aspx>

The stricter amendments of Annex VI consists of a progressive reduction globally in emissions of SO_x, NO_x and particulate matter and the introduction of emission control areas (ECAs) to reduce emissions of those air pollutants further in designated sea areas²⁴⁷.

The revised NO_x Technical Code 2008 includes a new chapter based on the agreed approach for regulation of existing (pre-2000) engines established in MARPOL Annex VI, provisions for a direct measurement and monitoring method, a certification procedure for existing engines, and test cycles to be applied to Tier II and Tier III engines.

Revisions to the regulations for ozone-depleting substances, volatile organic compounds, shipboard incineration, reception facilities, and fuel oil quality have been made with regulations on fuel oil availability added.

In this regard it may be mentioned that air pollution from ships has been dealt with also within the framework of the EU. In November 2002, the EU Commission adopted the strategy of reduction of emissions of air pollutants from sea-going ships. The Commission modified directive 1999/32/EC in 2005 as regards the sulphur content of marine fuels²⁴⁸. The emissions of air pollutants from ships in the Baltic Sea, the North Sea, the north-eastern part of the Atlantic, the Mediterranean, and the Black Sea – were estimated to have been 2.6 million tonnes of sulphur dioxide and 3.6 million tonnes of nitrogen oxides (expressed as NO₂) a year in 2000. Despite the enforcement of MARPOL Annex VI, this set limits on the sulphur content of marine fuels for the Baltic Sea, the North Sea and the English Channel, and emissions of SO_x from international shipping are expected to increase by more than 42 per cent by 2020, and those of NO_x by two thirds. In both cases, by 2020 the emissions from international shipping around Europe will have exceeded the total from all land-based sources in the 25 member States combined. The Directive limited the maximum sulphur content of the fuels used by ships operating in these sea areas to 1.5%. This fuel standard applies also to passenger ships operating on regular service outside SECAs. However, already at the time of adoption the SECA fuel standard was widely recognised as being insufficient to address observed environmental impacts from shipping²⁴⁹.

On the 1st January 2010 the EU implemented its requirement that ships burn fuel of 0.1 per cent sulphur content or less when they are within EU ports or within EU inland waterways. In 2012 the Directive was adopted amending the one from 1999 in order to further reduce the maximum sulphur content of marine fuels²⁵⁰.

²⁴⁷ Under the revised MARPOL Annex VI, the global sulphur cap is reduced initially to 3.50% (from the current 4.50%), effective from 1 January 2012; then progressively to 0.50 %, effective from 1 January 2020, subject to a feasibility review to be completed no later than 2018. The limits applicable in ECAs for SO_x and particulate matter were reduced to 1.00%, beginning on 1 July 2010 (from the original 1.50%); being further reduced to 0.10 %, effective from 1 January 2015. Progressive reductions in NO_x emissions from marine diesel engines installed on ships are also included, with a “Tier II” emission limit for engines installed on or after 1 January 2011; then with a more stringent “Tier III” emission limit for engines installed on or after 1 January 2016 operating in ECAs. Marine diesel engines installed on or after 1 January 1990 but prior to 1 January 2000 are required to comply with “Tier I” emission limits, if an approved method for that engine has been certified by an Administration.

²⁴⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:191:0059:0069:EN:PDF>. Accessed 13 February, 2014. See “Air Pollution from Ships. A briefing document (2004)” by: the European Environmental Bureau (EEB), the European Federation for Transport and Environment (T&E), Seas At Risk (SAR) and the Swedish NGO Secretariat on Acid Rain. Accessed September 5, 2013. <http://www.flad.pt/documentos/1227109470H7mFL7ge1Kr88CN8.pdf>

²⁴⁹ Accessed September 5, 2013. <http://ec.europa.eu/environment/air/transport/ships.htm>

²⁵⁰ Directive 2012/33/EU of the European Parliament and of the Council 21 November 2012 amending Council Directive 1999/32/EC as regards the sulphur content of marine fuels *OJ L 327, 27.11.2012*.

5.5 MARPOL Special Areas and Particularly Sensitive Areas

Marine Protected Areas (MPAs) are also recognised under the regime of the 1982 UNCLOS specifically Article 211. However, it has been observed that the issue of establishing of such areas on the high seas is far from clear²⁵¹. On one hand, the IMO has the competence regarding international shipping in such areas; but on the other hand, the debate is pending on the status of such areas in the forum of the United Nations²⁵² Open Ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS). The issue of MPAs was discussed at this forum; however, there is still no clear set of conditions or modalities on how to establish such areas²⁵³. The decisive factors are ecological conditions is species related, as it covers depleted, threatened; or endangered marine species; areas of high productivity; spawning; breeding of nursery grounds for important marine species; and areas representing migratory routes for marine mammals and sea birds. Rare or fragile eco-systems (e.g. coral reef, mangroves, and wetlands) and /or critical habitats for marine resources are also being considered.

Special Areas: The IMO has the jurisdiction to establish Special Areas, which is a category of MPAs²⁵⁴. Special Areas are areas designated in Annexes I (Prevention of pollution by oil), II (Control of pollution by noxious liquid substances), IV (Prevention of pollution by sewage from ships) and V (Prevention of pollution by garbage from ships) of MARPOL as marine areas in which, for the reasons relating to their oceanographical and ecological condition and to their sea traffic, the adoption of specially strict mandatory methods for the prevention of sea pollution is required. The oceanographically conditions focus on how vulnerable is the ecosystem of a particular area is to possible damage²⁵⁵. The possible conditions for vulnerability include circulation patterns (such as convergence zones or gyres), temperate and salinity stratification; flushing rates, extreme weather conditions, and the rate of exchange of water, such as the Baltic Sea²⁵⁶.

Annex VI Regulations for the Prevention of Air Pollution from Ships establishes certain sulphur oxide (SO_x) Emission Control Areas (ECAs) with more stringent controls on sulphur emissions²⁵⁷. Particularly interesting is the US implementation of Annex VI. In 2009, they submitted a joint proposal with the Canadian government to the IMO to designate coastal areas for low sulphur fuel use that will substantially reduce emissions coming from ocean-going vessels. The US flagged ships must match the standards of MARPOL Annex VI. The US have calculated that the benefits from its enforcement are in total, something like 30:1, so for every dollar spent thirty dollars in health benefits can be saved and it totals up to billions²⁵⁸.

²⁵¹ Alexander Gillespie, *Protected Areas and International Environmental Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2007), 17; *Id. Conservation, Biodiversity and International Law* (Cheltenham/Northampton, Mass: Edward Elgar Publishing, 2012), 189-191.

²⁵² *Ibid.*

²⁵³ Gillespie, "Protected Areas", 17.

²⁵⁴ On all categories (not included in IMO) see: Tundi Spring Agardy, *Marine Protected Areas and Ocean Conservation* (Austin, Texas: R.G. Landes Company, 1997), 100-107.

²⁵⁵ Gillespie, "Conservation", 191.

²⁵⁶ *Ibid.*, 192.

²⁵⁷ For the list of special areas under MARPOL see the IMO website. Accessed September 5, 2013. <http://www.imo.org/ourwork/environment/pollutionprevention/specialareasundermarpol/Pages/Default.aspx>

²⁵⁸ They has also assessed the impact of Annex VI with air quality modeling and used census data to find the populations exposed to emissions from locomotive hubs and from ports, in particular they found that minority populations were two to three times as likely to be exposed to the pollution from ocean-going vessels. 67,000 people are exposed to ocean-going vessel pollution. They concluded that the combination of Annex VI measures with the emission control area will substantially reduce that exposure. See National Environmental Justice Advisory Council Meeting, 27-29 January, 2010, Thursday,

Particularly Sensitive Areas (PSSAs): A Particularly Sensitive Sea Area (PSSA) is an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities. An area can be designated as PSSA and at the same time as a special area, which is frequently practice.

Guidelines on designating a (PSSA) are contained in resolution A.982(24) called Revised Guidelines for the identification and designation of Particularly Sensitive Sea Areas (PSSAs), adopted by the IMO Assembly in November-December 2005 at its 24th session.

To be designated a PSSA, such area must fulfil a number of criteria: ecological criteria; social, cultural and economic criteria, such as significance of the area for recreation or tourism; and scientific and educational criteria, such as biological research or historical value.

Whilst dealing with ecological conditions relating to PSSAs, the IMO has endeavoured to distinguish this section from Special Areas by including eight possible sub-sets. The additional categories are uniqueness; representativity; dependency; productivity; diversity; integrity; vulnerability; and its naturalness or the degree to which it is submitted to human influence. These conditions were added in 2001 with the possibility of adding further criteria of critical habitat and bio-geographical importance. The example of such as PSSA, fulfilling all criteria can be Great Barrier Reef²⁵⁹.

When an area is approved as a particularly sensitive sea area, specific measures can be used to control the maritime activities in that area, such as routeing measures, strict application of MARPOL discharge and equipment requirements for ships, such as oil tankers; and installation of Vessel Traffic Services (VTS)²⁶⁰.

A PSSA can be protected by ships routing measures – such as an area to be avoided: an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and therefore should be avoided by all ships, or by certain classes of ships.

For instance, the US established a national programme to designate certain areas of marine environments as areas of special national significance that warrant heightened care in its National Marine Sanctuaries Act²⁶¹. The primary purpose of the law is to protect marine resources and ecosystems, such as coral reefs, sunken historical vessels, or unique habitats, from degradation while facilitating public or private uses compatible with resource protection. In some sanctuaries the discharge of sewage is prohibited in special zones to protect fragile habitat, such as coral. The USA authorities also provide for civil penalties for violations of its requirements or the permits issued under it.

In the case of the European Union, the map below shows the areas that have been designated as Particularly Sensitive Sea Areas (PSSA) in Europe in 2012²⁶².

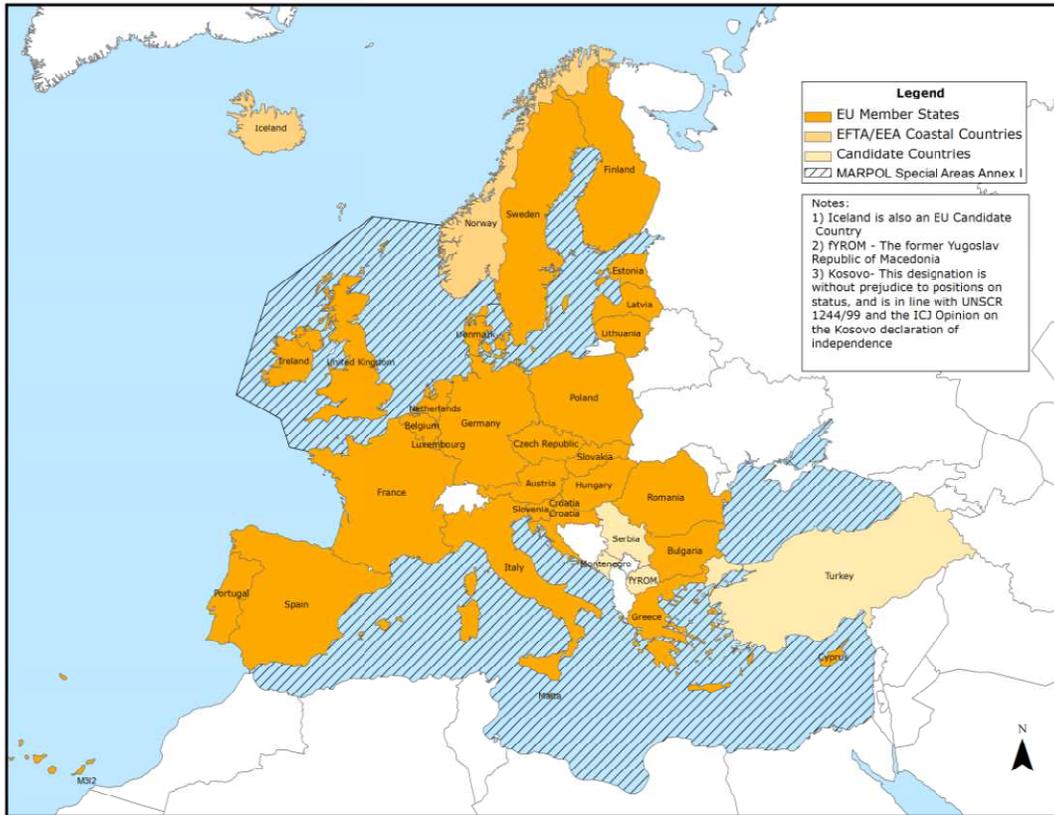
<http://www.epa.gov/compliance/environmentaljustice/resources/publications/nejac/nejacmtg/nejac-meeting-trans-012810.pdf>

²⁵⁹ Gillespie, "Conservation", 192.

²⁶⁰ For the list of adopted PSSAs see the IMO website. Accessed September 5, 2013. <http://www.imo.org/OurWork/Environment/PollutionPrevention/PSSAs/Pages/Default.aspx>

²⁶¹ The National Marine Sanctuaries Act (NMSA; 16 U.S.C. § 1431 et seq.), as amended.

²⁶² See European Maritime Safety Agency, *Addressing Illegal Discharges in the Marine Environment*, 2012, p. 20, available at www.emsa.europa.eu



MARPOL annex I: Special Areas

5.6 Enforcement

The enforcement of MARPOL can be done in three different ways:

- through ship inspections to ensure that vessels fulfil minimum technical standards;
- by monitoring ship compliance with discharge standards;
- and by punishing ships violating the standards²⁶³.

The main responsibility of inspections of ships is bestowed on the flag State. The MARPOL requires States to conduct inspections or surveys prior to putting the ship into service and when issuing the five year International Oil Pollution Prevention Certificate (IOPP). At minimum a survey must be conducted once every five years. The ship which fails such a survey cannot sail unless it has fulfilled MARPOL standards.

One particular features of MARPOL is the wide scope of the port State jurisdiction. The PSC officers can board the vessel and inspect the ship's IOPP certificate and other MARPOL certificates. In case of the lack thereof or there are "clear grounds" to believe that the condition of the ship, its equipment or crew does not substantially meet international Convention, the PSC has jurisdiction of conducting the full detailed survey. If the ship, on the other hand has IOPP, the PSC has to treat it as its own and issue a "clean" inspection report to the master of the ship²⁶⁴.

Moreover in the event of "clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of the certificate" the PSC has the authority to conduct a

²⁶³ Griffin, "MARPOL 57/78", 489.

²⁶⁴ Art. 5(1) MARPOL 73/78.

complete survey²⁶⁵. A port State has the jurisdiction to take administrative measures to prevent a vessel from leaving if it has breached international regulations applying to its navigation and if it threatens marine environment. Inspection can result in detention or temporary arrest of the ship and inspection report can be forwarded to any State requiring it²⁶⁶. However, “all possible efforts shall be made to avoid a ship being unduly detained or delayed under Article 4, 5 or 6 of the present Convention, it shall be entitled to compensation for any loss or damage suffered”²⁶⁷.

Monitoring vessel discharges constitutes the second element of enforcement under the MARPOL²⁶⁸. All State Parties are required to cooperate in detecting ship violations, through environmental monitoring; reporting and accumulation of evidence. MARPOL provides that the Parties to the Convention “shall cooperate in the detection of violations and the enforcement of the provisions of the Convention, using all appropriate and practicable measures of detection and environmental monitoring, adequate procedures for reporting and accumulation of evidence (Art. 6(1)). Further, it states that any Party shall furnish to the Administration evidence, if any, that the ship has discharged harmful substances or effluents containing such substances in violation of the provisions or the Regulations. If it is practicable to do so, the competent authority of the former Party shall notify the Master of the ship of the alleged violation (Art. 6(3))”. Parties have the duty to furnish the Administration information on the discharge of harmful substances or effluents. Upon the receipt of such evidence, the Administration so informed is to investigate the matter and may request the other party to furnish further better evidence of the alleged contravention. If the Administration is satisfied that sufficient evidence is available to enable proceedings to be taken in accordance with its law it shall do so as soon as possible. The Administration shall promptly inform the party which has reported the alleged violation, as well as the IMO, of such actions (Art. 6(4)). Breaches of MARPOL on the high seas are very difficult to prove. The best way to detect such a violation is when the ship is docked or in an off-shore terminal, as the MARPOL gives jurisdiction to PSC to conduct discharge inspections, through survey of its oil record book and oil discharge monitoring equipment and checking amounts of dirty ballast or oily residues in slop tank, as evidence of incorrect operational discharge²⁶⁹.

As to the punishment of “any violations of the requirements of the Convention”, Article 4 provides a double system of national prohibitions and sanctions. First, violations are to be prohibited and sanctions to be established under the law of the Administration of the ship²⁷⁰ concerned, wherever the violation occurs (Art. 4(1)); and, secondly, violations are to be prohibited and sanctions established under the law of the Party within whose jurisdiction they occur (Art. 4(2)).

In the event of such a violation within a jurisdiction of any Party of the Convention, according to Article 4(2), this Party can either start proceedings in accordance with its own law or furnish such information and evidence as it may have in possession that violation has occurred to the Administration of the ship concerned (Art. 4 (2a-b)). Article 4(1) further provides that if the Administration of the ship involved in a violation is informed of it is satisfied that sufficient evidence is available to enable proceedings to be brought that Administration shall cause such proceedings as soon as possible in accordance with its law. The Administration has also an obligation of notifying the State Party which reported the violation of the action it had taken²⁷¹. It may also be noted that ‘any violation’ in Article 4(2) means that it applies to operational and discharge standards, as well as to design and equipment standards of the Convention. Art.

²⁶⁵ Art. 5 (2) MARPOL M73/78.

²⁶⁶ Art. 5 and 6 MARPOL 73/78 and Article 219 UNCLOS.

²⁶⁷ Art. 7 (1 and 2) MARPOL 73/78.

²⁶⁸ Griffin, “MARPOL 57/78”, 501.

²⁶⁹ *Ibid.*, 488-489.

²⁷⁰ ‘Administration’ means the Government of the State under whose authority the ship is operating. With respect to a ship entitled to fly a flag of any State, the Administration is the Government of that State. With respect to fixed or floating platforms engaged in exploration and exploitation of the sea-bed and subsoil thereof adjacent to the coast over which the coastal State exercises sovereign rights for the purposes of exploration and exploitation of their natural resources, the Administration is the Government of the coastal State concerned (Art. 2(5)).

²⁷¹ Art. 6(4) MARPOL 73/78.

4(4) further states that the penalties applied shall be adequate in severity to discourage violations of the Convention and shall be equally severe irrespective of where the violations occur.

The primacy of the jurisdiction of the flag State in environmental matters is confirmed by the provisions of the UNCLOS. Article 228 (1) of the UNCLOS provides that the proceedings against a foreign ship must be suspended in the event of the flag State instituting proceedings within six months after the original charges were commenced. Flag State has to enforce international rules and standards irrespective of the place of violation (Art. 217 of UNCLOS). Therefore, a flag State can supersede the port State jurisdiction and dismiss any proceedings brought by that port State²⁷².

5.7 Case studies: MARPOL

5.7.1 The US and the Enforcement of MARPOL

The US' implementation of MARPOL Convention fully develops the port state jurisdiction, and further extends it forward to all the vessels in its jurisdictional waters, included the exclusive economic zone.

The US became a party to MARPOL in 2008 and it is implemented domestically through the Act to Prevent Pollution from Ships²⁷³ (APPS hereinafter) and to a lesser extent by the Clean Water Act. The US has ratified those MARPOL annexes that meet their demands and try to conciliate its practice with those annexes that they have not ratified because they do not meet US standards.

Regarding the compliance of MARPOL, the US has faced the problems derived from the fact that MARPOL Annexes are only in force when ratified and implemented by the flag state, by adopting the port State control approach and imposing MARPOL' rules and standards on foreign vessels while in its jurisdictional waters²⁷⁴.

APPS applies to all U.S. flagged ships anywhere in the world, and to all foreign flagged vessels while operating in the navigable waters of the US or while at a port or terminal under its jurisdiction.

The APPS foresees the knowing violation of the MARPOL, the Act, or regulations²⁷⁵ relating to wastes from ships, including garbage, oil, and hazardous substances and establishes a penalty of imprisonment of not more than 10 years and/or fines as set forth in 18 U.S.C. 3571.

The combined intervention of the Coast Guard and the Environmental Protection Agency as guarantors of criminal enforcement has been key to its success in prosecuting some major cases. In the case of cruise ships, the practice has shown that cruise ships with robust structural standards have been criminally prosecuted for deliberate substantive MARPOL violations, as well as for negligent violations. Since the policy initiative of 1993 on wide-ranging vessel pollution, the U.S. Department of Justice, in conjunction with the Coast Guard and EPA's Criminal Investigation Division, has worked on a vessel pollution enforcement initiative designed to detect, investigate, and prosecute illegal vessel discharges of oily wastes, plastics, and other wastes that are in violation of U.S. environmental laws, including those implementing international treaties such as MARPOL, as well as related criminal violations.

²⁷² Andrew Rakestraw, "Open Oceans and Marine Debris: Solutions for the Ineffective Enforcement of MARPOL Annex V", *Hastings International and Comparative Law Review* 35 (2012): 392.

²⁷³ Act to Prevent Pollution from Ships, 33 U.S.C. 1901 et seq.

²⁷⁴ Cruise Ship Discharge Assessment Report U.S. Environmental Protection Agency, Oceans and Coastal Protection Division, Office of Wetlands, Oceans, and Watersheds Office of Water, December 29, 2008, EPA842-R-07-005, available on Internet at <http://water.epa.gov/type/oceb/upload/0812cruiseshipdischargeassess.pdf> (last consulted 1 December 2013).

²⁷⁵ See 33 U.S.C. 1908(a)

The federal enforcement effort has resulted in numerous criminal convictions of every segment of the maritime industry, including the cruise ship industry, for knowing violations of these environmental statutes. All large cruise ships calling at U.S. ports must abide by the requirements of MARPOL and APPS. However, the failure by individual cruise ships to comply with these requirements has resulted in criminal violations of the law. Convictions for environmental pollution by cruise lines have been obtained since 1995 until now. The US has imposed convictions for deliberate environmental crimes, false statements, and obstruction of justice by both the largest cruise lines operating the largest cruisers, as well as the smallest. The US has fought omissions most thoroughly because the most common violations consist of the knowing and wilful making of materially false statements in a ship's Oil Record Books, the log in which all overboard discharges are required to be recorded, in order to conceal intentional discharges made in violation of MARPOL.

The cruise ship prosecutions have involved as much as hundreds of thousands of gallons of oil-contaminated waste per ship per year, and in some cases have involved multiple violations of fleets. Other convictions have involved the deliberate discharge of pollutants without a permit within the navigable waters of the US, including specifically, waste oil, plastics, sewage, and hazardous chemicals such as dry cleaning solvents, printing solvents, and photochemicals discharged through graywater systems in violation of Clean Water Act. The violation of the Clean Water Act has also been in the core of the prosecution and condemnation of the British Petroleum, even though this case is oil pollution from an oil rig.

In most cases, environmental violations, including cruise ships with falsified logs and use of equipment and procedures to bypass treatment systems, were not previously discovered during numerous prior inspections by port states, the vessel's flag state, or classification society. These prosecutions are widely credited with helping to raise awareness within the cruise ship industry of the importance of environmental compliance, and have led to the installation of new equipment on many ships. Convicted companies were placed on probation and required to develop and implement enhanced environmental compliance measures, including additional outside audits.

With respect to implementation of MARPOL Annex I, APPS applies to all U.S. flagged ships anywhere in the world, and to all foreign flagged vessels operating in the navigable waters of the United States. Violations of APPS or MARPOL may lead to detention of the vessel in port, denial of port entry, or the initiation of civil or criminal enforcement proceedings. Additional Coast Guard regulations (33 CFR 151.13) prohibit the discharge of oil or an oily mixture within MARPOL special areas unless the above requirements are met and the vessels oily-water separating equipment is equipped with a device that stops the discharge automatically when the oil content of the effluent exceeds 15 ppm. Further, Coast Guard regulations (33 CFR 151.10) provide that if the bilge water cannot be discharged in compliance with these standards, then it must be retained onboard or discharged to a designated reception facility. However, both MARPOL and the APPS regulations exempt emergency discharges needed to save the ship or save a life at sea.

In the case *United States v. Kun Yun Jho*, on 30 June, 2008, the U.S. Court of Appeals for the Fifth Circuit reversed a lower court's dismissal of criminal charges against Kun Yun Jho and Overseas Shipholding Group, Inc. for knowingly failing to maintain an oil record book aboard the Pacific Ruby²⁷⁶. This case is significant for the international maritime community primarily because of the Court's decision that international law, specifically UNCLOS and the "law of the flag" doctrine, does not supersede the authority and jurisdiction of the United States to prosecute pollution related incidents by foreign-flag vessels that occur outside of U.S. waters if the foreign-flag vessels subsequently call at U.S. ports and have maintained inaccurate oil record books²⁷⁷.

²⁷⁶ *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618, 625 (citing 33 C.F.R. § 151.25).

²⁷⁷ See Gregory F. Linsin and Conor T. Warde, "United States: U.S. Court Strikes Down MARPOL and UNCLOS Defenses in OSG Prosecution", *Blank Rome LLP*, July 3 2008, available at

The Pacific Ruby, a non-U.S. tanker, was apparently engaged in lightering operations from off-shore tankers to ports along the Gulf of Mexico. A whistleblower on board the vessel alerted the Coast Guard to allegedly unlawful discharges from the vessel and also alleged that Jho had tampered with the oily water separator system. In a subsequent Coast Guard inspection, the Coast Guard claimed to have discovered evidence corroborating the whistleblower's allegations.

The U.S. Department of Justice brought charges against both Jho and OSG in which it put ten counts, specifically one count of conspiracy, one count of making false statements to the Coast Guard, and eight counts of knowingly failing to maintain an oil record book. These final eight counts related to eight separate port calls in the United States at which the PACIFIC RUBY allegedly entered U.S. ports with a knowingly inaccurate oil record book.

Jho and OSG argued that international law prevented the United States from prosecuting them for these alleged oil record book violations. They claimed that the U.S. had no authority to pursue a prosecution against "a foreign flag ship for alleged violations of U.S. Coast Guard regulations that occurred aboard ship and outside U.S. waters."²⁷⁸

The criminal charges against Jho and OSG stem from allegedly knowing violations of the oil record book requirements under the APPS regulations implementing MARPOL. These requirements apply only to foreign-flag

vessels "while in the navigable waters of the United States, or while at a port or terminal under the jurisdiction of the United States."²⁷⁹

The Court of Appeal disagreed with the lower court on two substantial grounds. First, the Court concluded that the lower court "erred in construing the criminal conduct alleged against Jho and OSG to have occurred 'outside U.S. waters.'" Second, the Court concluded that neither the "law of the flag doctrine" nor UNCLOS limited the United States government from exercising jurisdiction to prosecute violations of U.S. criminal laws committed in its ports.

The Court of Appeals stated that "ignoring the duty to maintain the oil record book puts the APPS at odds with MARPOL's and Congress' clear intent under the APPS to prevent pollution at sea according to MARPOL."²⁸⁰ It further stated that, "If the record books did not have to be 'maintained' while in the ports or navigable waters of the United States, then a foreign-flagged vessel could avoid application of the record book requirements simply by falsifying all of its record book information just before entry into a port or navigable waters....[and] the Coast Guard's ability to conduct investigations against foreign-flagged vessels would be severely hindered, and the regulation would allow polluters (and likely future polluters) to avoid detection." The Court held that the requirement for an oil record book to be "maintained" imposed "a duty upon a foreign-flagged vessel to ensure that its oil record book is accurate (or at least not knowingly inaccurate) upon entering the ports of navigable waters of the United States."²⁸¹

The opinion by the Court appears to support the government's view that a distinct criminal act is committed each time the vessel entered a port of the United States with an oil record book known to be inaccurate.

<http://www.mondaq.com/unitedstates/x/62880/cycling+rail+road/US+Court+Strikes+Down+MARPOL+And+UNCLOS+Defenses+In+OSG+Prosecution>

²⁷⁸ Ibidem.

²⁷⁹ Ibidem.

²⁸⁰ Ibidem.

²⁸¹ Ibidem.

This decision by the U.S. Court of Appeal for the Fifth Circuit provides judicial approval for U.S. government criminal prosecutions of owners, operators and crew members of foreign-flagged vessels for alleged MARPOL violations that occur on the high seas. In broader terms, the U.S. government now has the confirmed authority to prosecute MARPOL/APPS violations, at least in relation to falsified oil record books, no matter where the actual alleged pollution incident and false oil record book entries occurred.

MARPOL contains additional requirements on what information must be recorded in an Oil Record Book, including the details of overboard discharges of bilge water which has accumulated in machinery spaces. Cruise ships must maintain an accurate record of overboard discharges per this requirement²⁸².

Deliberate discharges of untreated bilge water might be accompanied by efforts to deceive port state control officials by falsifying the Oil Record Book. Several port states (i.e., the country the cruise ship visits) have reacted by increasing their scrutiny of oil water separation systems and diligence for oil record book keeping. The U.S. is initiating actions for such criminal violations²⁸³. Up to 2008, the U.S. had prosecuted over 75 cases involving intentional discharges of oily bilge waste from vessels in general, with over \$150 million collected in criminal fines since 2000. Many of the major cruise ship companies calling on U.S. ports have been convicted of such violations, including, Royal Caribbean, Holland America, Carnival and Norwegian Cruise Line Limited. As a result of the prosecutions, all the companies have been at one time placed on probation with a requirement to implement Environmental Compliance Plans.

There are also examples of self-regulation of the industry that seeks compliance with MARPOL. The Cruise Lines International Association (CLIA) has adopted environmental standards designed to increase compliance with regulatory regimes such as MARPOL²⁸⁴, and according to CLIA, its members are committed to implementing a policy goal of zero discharge of MARPOL Annex V solid waste products (garbage) by use of more comprehensive waste minimization procedures to significantly reduce shipboard-generated waste. However this example of self-regulation has not resulted in the US authorities dropping their guard²⁸⁵.

²⁸² (MARPOL, Annex I, Appendix III(D)). MARPOL also requires the logging of any failure of the oil discharge monitoring and control equipment (Id. at Appendix III(F)). MARPOL also requires that any accidental or other “exceptional” discharge be recorded in the Oil Record Book (Id. at Appendix III(G)).

²⁸³ See USEPA, *Cruise Ship Discharge Assessment Report*, EPA 842-R-07-005, December 2008.

²⁸⁴ CLIA reports that the standards address, among others, the following waste streams: graywater and blackwater (sewage) discharges; bilge and oily water residues; incinerator ash; hazardous chemical waste such as photo processing fluid and dry-cleaning chemicals; unused and outdated pharmaceuticals; used batteries; burned out fluorescent and mercury vapor lamps; and glass, cardboard, and aluminum and steel cans. The CLIA standards entitled, “Cruise Industry Waste Management Practices and Procedures,” include an attachment reflecting a 2006 revision (CLIA, 2006). Implementation of the CLIA membership commitment to address these waste streams is intended to occur via incorporation of the CLIA environmental protection policies into responsible persons’ SMS documents. CLIA has acknowledged violations of environmental laws by cruise lines, and believes that these violations have served as an important warning for the industry. As a result of the violations and associated penalties, CLIA member lines have strengthened their environmental policies and procedures. See CLIA Industry Standard, *Cruise Industry Waste Management Practices and Procedures*, 2006, available at <http://cruising.org> and at <http://www.cliaalaska.org/?s=CLIA+Sourcebook>

²⁸⁵ The standards do not provide for a CLIA-sponsored inspection or verification mechanism. All cruise ships that were criminally convicted had incorporated environmental standards into their SMS. EPA does not have an independent basis to determine the nature and extent of compliance by CLIA member lines, which is not required by state or federal law. Nevertheless, EPA appreciates efforts by the cruise ship industry and regulated community to improve the environmental compliance by CLIA member lines, and hopes that the waste management measures undertaken by the cruise line industry will benefit the environment and will set an example for cruise ship operators that are not members of CLIA. See USEPA, *Cruise Ship Discharge Assessment Report*, EPA 842-R-07-005, December 2008.

5.8 The Role Played by the European Union

The EU is not a Party to MARPOL²⁸⁶. Nevertheless, in 2005 the EU decided to transpose into EU law the standards introduced by the MARPOL Convention related to the prohibition of polluting discharges into the sea and in order to specify the sanctions to be imposed adopted Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements²⁸⁷. This means that the Commission not only wanted to address the issue and harmonize it, but also wanted to prescribe criminal sanctions to its Member States²⁸⁸. This Directive has been amended in 2009 by Directive 2009/123/EC²⁸⁹.

The rationale for transposing MARPOL into EU law was that the implementation of MARPOL showed discrepancies among EU Member States, in particular in relation to the imposition of penalties for discharges of polluting substances from ships, therefore there was a need to harmonize MARPOL implementation at EU level²⁹⁰.

5.9 The Ship-Source Pollution Directive Compared to MARPOL

As anticipated above, MARPOL establishes a general prohibition of all discharges of oil and noxious substances. In addition, Regulation 11 of Annex I and Regulation 6 of Annex II provide for a set of exceptions according to which discharges are permitted in three cases: where necessary to secure the safety of a ship or save life at sea (*a*); where the discharges into the sea of oil or oily mixture result from damage to a ship or its equipment provided that i) “all reasonable precautions” were taken “after the occurrence of the damage or discovery of the discharge” for the purposes of preventing or minimizing the discharge; and that ii) the owner or the master did not act either with intent to cause damage, or recklessly and with knowledge that damage would probably result (*b*); and where approved by both the flag State and any Government in whose jurisdiction it is contemplated the discharge will occur, in order to combat a specific pollution incident for minimizing the damage from pollution (*c*). On the other hand, Art. 4 of Directive 2005/35/EC provides that “Member States shall ensure that ship-source discharges of polluting substances [...] are regarded as infringements if committed with intent, recklessly or by serious negligence”. In addition, Art. 5 consists in two paragraphs that refer directly to the MARPOL exceptions to the general prohibition of discharge of oil and noxious liquid substances (see above). Paragraph one provides that

²⁸⁶ Accessed September 10, 2013. <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>

²⁸⁷ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements. *OJ L 255, 30.9.2005, p. 11–21*. In general, see Liu Nengye, “The European Union’s Role in the Prevention of Vessel-Source Pollution and its International Influence”, *The Journal of International Maritime Law* 15 (2009) 411-422; Francesca Pellegrino, “The Introduction of Penalties for Ship-source Pollution in Community Law: Recent Developments”, *European Transport* 48 (2011) 99-108; Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-source Pollution, International Law, State Practice and EU Harmonisation* (Martinus Nijhoff Publishers, 2013) 209 ff. and Chie Kojima, “Ship-Source Pollution and Public International Law”, in *Selected Issues in Maritime Law and Policy, Liber Amicorum Proshanto K. Mukherjee*, ed. Maximo Q. Mejia (New York: Nova Publishers, 2013), 91.

²⁸⁸ It is worth mentioning that, likewise CITES, in the absence of a full transfer of powers previously exercised by the Member States to the EU, but given the existence of EU legislation, the EU Member States must be regarded as participating in MEAs as trustees of the Union’s interest. See Pavoni, “Controversial Aspects”, 368 and Cremona “Member States as Trustees”, 8-9.

²⁸⁹ Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements [2009] OJ L280, 27.10.2009, p. 52.

²⁹⁰ Accessed September 5, 2013. <http://www.emsa.europa.eu/main/enforcement-eu-legislation/topics-a-instruments/196-instruments-of-liability-a-compensation/673-ship-source-pollution.html>.

“A discharge of polluting substances into any of the areas referred to in Article 3(1) [internal waters] shall not be regarded as an infringement if it satisfies the conditions set out in Annex I, Regulations 9, 10, 11(a) or 11(c) or in Annex II, Regulations 5, 6(a) or 6(c) of Marpol 73/78”.

Paragraph two states that

“A discharge of polluting substances into the areas referred to in Article 3(1)(c), (d) and (e) [straits used for international navigation, EEZs and the high seas] shall not be regarded as an infringement for the owner, the master or the crew when acting under the master’s responsibility if it satisfies the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b) of Marpol 73/78”.

It has to be noted that the “amending” Directive adopted in 2009 refers to discharges that satisfy the conditions contained in Annex I Regulations 15, 34, 4.1 or 4.3 or in Annex II, Regulations 13, 3.1.1 or 3.1.3 of MARPOL 73/78.

In light of the above, MARPOL and the ship-source pollution Directive differ in the following: MARPOL consider a discharge being “reckless” only if made with “knowledge that damage would probably result”, whereas the Directive does not contain this additional specification and only covers cases of pollution committed “with intent, recklessly or by serious negligence” (although not providing further guidance as to the precise content of these criteria). Art. 5(1) of the Directive, that applies to internal waters, includes letters *a* and *c* of Regulation 11 of Annex I (and the corresponding provision in Annex II) of MARPOL in the regime of exceptions to liability, but excludes letter *b* on pollution resulting from damage to the ship or its equipment. Art. 5(2) of the Directive, dealing with pollution in the straits used for international navigation, in the EEZ or on the high seas, excludes from the exceptions to liability for pollution resulting from damage to the ship or its equipment all the persons different from the owner, the master and the crew acting under the master’s responsibility. In other words, anyone could be in principle liable and subject to penalties in respect of a discharge. By contrast, in MARPOL the exclusion from liability for discharges operates only if the master or the owner did not act either with intent to cause damage, or recklessly and with knowledge that damage would probably result. The literal wording of the provision seems to suggest that the acts of persons other than the owner or master are completely irrelevant in the case of discharge resulting from damage to the ship or its equipment. Discharge would appear to be prohibited only where one of these two persons acted with intent or recklessly and with knowledge that damage would probably result. On this point some Authors have highlighted that such an interpretation of MARPOL would lead to the rather illogical result that, for example, a person who caused intentional damage to a ship or its equipment could escape liability so long as neither the master nor the owner acted with intent or recklessly²⁹¹.

These divergences between the international and the European standards led a coalition of the shipping industry to bring an action against the Secretary of State for Transport before the English High Court of Justice²⁹². It has to be highlighted that an incompatibility between the European and the international rules could lead to a situation where Member States face the choice of being *either* in line with the EU provisions, but not in compliance with the international obligations or *vice versa*. In 2008 the High Court of Justice (Queen’s Bench Division) decided to make a referral for a preliminary ruling to the ECJ regarding the validity of the ship-source pollution Directive in light of international law, in particular MARPOL (and the Law of the sea Convention). Among the different issues referred to the ECJ²⁹³, the most relevant for our

²⁹¹ See Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators*, cit. 225 and the Authors quoted therein.

²⁹² *The Queen on the Application of the International Association of Independent Tanker Owners (Intertanko) and others v Secretary of State for Transport* [2006] EWHC 1577

²⁹³ The issues referred to the ECJ were the following: the EU’s authority to adopt legislation that derogates from international standards with respect to foreign vessels in straits used for international navigation, in the EEZs and on the high seas; the EU’s right to exercise, with regard to the territorial sea, a prescriptive jurisdiction that exceeded the scope of MARPOL; the invalidity of the “serious negligence” requirement contained in Art. 4

purposes dealt with the standard of fault contained in the Directive compared to the one set by MARPOL and to the range of persons potentially subject to penalties, as it will be explained further on.

On 3 June 2008 the ECJ rendered its judgment, but it declined assess the ship source pollution Directive in light of MARPOL (nor of the Law of the sea Convention)²⁹⁴ in so far as the EU was not Party to the Convention²⁹⁵. However, the Advocate General's (AG) opinion provided some guidance for this assessment.

With particular reference to the standard of fault, the AG specified that the requirement of "knowledge" established under MARPOL had to be interpreted in the sense that the perpetrator should have been aware of the risks posed by his/her actions, as is generally the case where the standard of liability in regard to recklessness is applied in common-law jurisdictions. It would not have been sufficient that the perpetrator ought to have been aware of those risks. Therefore, the AG considered that EU Member States should have interpreted the term "recklessly" as contained in Art. 4 of Directive 2005/35/EC in a narrow way so that for recklessness to exist there should have been "knowledge" that damage would probably result²⁹⁶. Furthermore, it has to be noted that the ECJ managed instead to analyse the requirement of "serious negligence", although not in light of MARPOL, but against the principle of legal certainty. The ECJ considered that the "serious negligence" requirement could also include an element of "knowledge"²⁹⁷. A serious breach of a duty of care (as provided by the Directive) could in fact correspond to a reckless behavior with knowledge that damage would probably result (as provided by MARPOL). Following these interpretations the compatibility between the international and the EU provisions would be assured. As it has been suggested by legal doctrine, "Member States will have implemented the Directives correctly so long as their domestic laws catch a sufficiently broad range of pollution incidents while specifically

Directive 2005/35/EC as it was considered in contrast with the principle of legal certainty. See, *ex multis*, Doris König, "The EU Directive on Ship-Source Pollution and on the Introduction of Penalties for Infringements: Development or Breach of International Law?", in Tafsir M Ndiaye and Rudiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff Publishers, 2007) 769; Ricardo Pereira, "On the Legality of the Ship-Source Pollution 2005/35/EC Directive – The Intertanko Case and Selected Others", *European Energy and Environmental Law Review* (2008) 372-383; Valsamis Mitsilegas, "The European Union and the Globalisation of Criminal law, *Cambridge Yearbook of European Legal Studies* 12 (2009-2010) 400-406, Alan K J Tan, "The EU Ship-Source Pollution Directive and Recent Expansions of Coastal State Jurisdiction", in Davor Vidas (ed.), *Law, Technology and Science for Oceans in Globalisation, IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Martinus Nijhoff Publishers, 2010) 292-293 and Riccardo Pavoni, "Controversial Aspects of the Interaction Between International and EU Law in Environmental Matters: Direct Effect and Member States' Unilateral Measures", in *The External Environmental Policy of the European Union*, ed. Elisa Morgera (Cambridge University Press, 2012) 353-360.

²⁹⁴ C-308/06, *International Association of Independent Tanker Owners (Intertanko)*, *International Association of Dry Cargo Shipowners (Intercargo)*, *Greek Shipping Co-operation Committee*, *Lloyd's Register*, *International Salvage Union*, *v Secretary of State for Transport* [2008] ECR I-4057. The Court stated that the validity of an act of secondary legislation can be examined in light of an international agreement only 1) where the Community is bound by the international agreement in question; 2) where the nature and the broad logic of the latter do not preclude this and 3) where, in addition, the provisions of that agreement appear, as regard their content, to be unconditional and sufficiently precise. The ECJ also stated that the ship-source pollution Directive could neither be assessed in light of UNCLOS in so far as it did not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State (para 64 of the Judgment).

²⁹⁵ Para 52 of the ECJ Judgment.

²⁹⁶ See AG's Opinion in *Intertanko*, para 100.

²⁹⁷ The ECJ interpreted serious negligence as "an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, *knowledge*, abilities and individual situation" (emphasis added, judgment, para 77).

targeting violations. In fact, the national laws of many States apply simply to ‘negligent pollution’, rather than addressing the concept of serious negligence”²⁹⁸.

As to the persons potentially liable and subject to penalties, the AG highlighted that, irrespective of its wording, MARPOL does not prohibit extending the liability to potentially a wider range of subjects of the shipping chain. In fact, the provision according to which, for the purposes of determining liability and applying sanctions, only the acts of the owner or the master are relevant in cases where a discharge results from damage to the ship or its equipment

“must be construed [...] merely by way of example. Where, in exceptional circumstances, other persons also are responsible for discharges resulting from damage, the same conditions apply to them as apply to the master and the owner”²⁹⁹.

In light of this, MARPOL seems to allow for an interpretation to the effect that a wider range of persons could be involved in the pollution and potentially subject to criminal penalties. In fact it cannot be ruled out in general that other persons bear responsibility and cause damage resulting in discharge³⁰⁰. This interpretation is more in line not only with the general objective of MARPOL to prevent pollution and to discourage potential perpetrators, but also with the provisions set forth by the ship-source pollution Directive whereby Member States are allowed to exclude from the exception of liability any operator in the shipping chain (e.g. the manager, charterer etc.) if they acted with intent or recklessly or with serious negligence³⁰¹.

Finally, with regard to the type of sanctions established under the international and the European regimes, as it has been anticipated above, next to the general prohibition of discharges, MARPOL specifies that sanctions have to be adequate in severity in order to discourage violations and equally severe irrespective of where the violations occurred. The nature of these sanctions is not clearly affirmed, though. By contrast, the ship-source pollution Directive, yet in its original version, required Member States to take measures to ensure that infringements were subject to “effective, proportionate and dissuasive”³⁰² sanctions, including *criminal* or *administrative* penalties (Art. 8 Directive 2005/35/EC). It is important to mention that this Directive was initially supplemented by a Council Framework Decision³⁰³, whose main aim was to approximate criminal-law legislation of the Member States by requiring them to establish a system of criminal penalties in order to combat the pollution caused by ships. The Framework Decision was indicating also the content of these criminal penalties (e.g. imprisonment up to ten years, fines up to 1.5 million euros, temporary or permanent disqualification from engaging in commercial activities, judicial winding up etc.). However, in 2007 upon request of the Commission, the Framework Decision was annulled by the European Court of Justice (hereinafter, “ECJ”)³⁰⁴. On that occasion the Court affirmed, *inter alia*, that although the Commission may have prescribed the use of criminal penalties, however, the “determination of the type and level of the criminal penalties to be applied d[id] not fall within the

²⁹⁸ Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-source Pollution*, cit., 224.

²⁹⁹ See AG’s Opinion in *Intertanko*, para 93.

³⁰⁰ *Ibid.*, para 89.

³⁰¹ See Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators*, cit. 226 and the Authors quoted therein.

³⁰² For the interpretation of the concepts of effective, dissuasive and proportionate penalties see, particularly, Michael Faure, “Effective, Proportional and Dissuasive Penalties in the Implementation of the Environmental Crime and Ship-source Pollution Directives: Questions and Challenges”, *European Energy and Environmental Law Review* (2010) 259-265.

³⁰³ Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution [2005] OJ L255, 12.7.2005, p. 164.

³⁰⁴ ECJ Judgment of 9 February 2007, in case C-440/05 *Commission v Council* [2007] ECR I-09097.

Community's sphere of competence"³⁰⁵. In other words, the European legislation could indicate the application of criminal sanctions, but the specific content of these should remain under the sovereignty of each Member State that maintain competence to decide on the types and levels of the criminal penalties for ship-source discharge violations. Subsequently, in order to fill the regulatory gap created by the annulment of the Framework Decision, the European legislator enacted Directive 2009/123/EC, which deleted the reference to the penalties of administrative nature and retained the one to the criminal penalties, thus aligning its wording with that contained in the environmental crime Directive. The final text, as far as natural persons are concerned, now requires that Member States shall take the necessary measures to ensure that ship-source discharges of polluting substances producing a deterioration of water quality³⁰⁶ and committed with intent, recklessly or by serious negligence be regarded as criminal offences and are punished by effective, proportionate and dissuasive *criminal* penalties³⁰⁷. Therefore, differently from the unclear wording of MARPOL, in the ship-source pollution Directive, at least the criminal nature of the measures is affirmed.

5.10 The Enforcement of the Ship-Source Pollution Directive in Light of the MARPOL Convention by the European Maritime Safety Agency

Some of the most criticized aspects of the Ship-Source Pollution Directive have already been assessed in practice and assessed by the European Maritime Safety Agency in its Report "Addressing Illegal Discharges in the Marine Environment" (EMSA, hereinafter)³⁰⁸.

The starting point is the global practice on voluntary spills. As proved by statistics, ship operators release more oil illegally into the marine environment than all of the accidental spills combined. Put in another perspective, according to an Interpol study, the illegal discharge of oil into the sea through routine operations every year is equal to over eight times the Exxon Valdez oil spill or over 48 times the 1997 Nakhodka spill off the coast of Japan³⁰⁹.

"Whether an illegal discharge is due to negligence (such as poor maintenance of equipment) or is deliberate (even actively promoted by the company), it is usually the result of action/inaction both on the part of ship operators, and of ship master and crew. On some occasions, violations of pollution regulations may result from lack of awareness by operators and crew. Deliberate illegal discharges occur due to a conjunction of two factors: 1) there are economic advantages for ship operators; 2) there is a low risk of being caught and penalized. Motivations for the individual crew members are slightly different; these are

³⁰⁵ Para 70 of the ECJ judgment. See Michael Faure, *Effective, Proportional and Dissuasive Penalties*, cit. 257-258; Matthias J Borgers, Tijs Kooijmans, "The Scope of the Community's in the Field of Criminal Law", *European Journal of Crime, Criminal Law and Criminal Justice* 16 (2008) 379-395 and Martin Hedemann-Robinson, "The EU and Environmental Crime: the Impact of the ECJ's Judgment on Framework Decision 2005/667 on Ship-Source Pollution", *Journal of Environmental Law* 20 (2008) 279-292.

³⁰⁶ Art. 5a.2. The Directive also specifies that minor but repeated discharges fall within the scope of the prohibition, unless no deterioration of water quality is caused (Art. 5a.3).

³⁰⁷ See Artt. 5a.1 and 8a Directive 2009/123/EC.

³⁰⁸ EMSA's Report of 3 October 2013, "Addressing Illegal Discharges in the Marine Environment", <http://www.emsa.europa.eu/news-a-press-centre/external-news/2-news/1879-addressing-illegal-discharges-in-the-marine-environment.html>

³⁰⁹ Interpol Report 2003.

less likely to include cost savings, but may be based on an intention to follow perceived instructions (often implied rather than explicit) and/or fear of losing a job”³¹⁰.

With respect to oily waste, for example, for which there is more information available than other substances, the OECD “Report on Cost savings stemming from non-compliance with International Environmental Regulations in the maritime sector”³¹¹ states that evidence from port State inspections reveal that nearly half of vessels inspected violate at least one aspect of the international environmental rules concerning the stowage and disposal of oil. While many transgressions are relatively minor, it is indicative that non-compliance with environmental law is common in the sector.

A study on the transposition into national law in the Member States of the Directive on ship source pollution concluded by EMSA in September 2011 revealed that there was a preference for administrative sanctions in the Member States. This study also found that minimum fines for legal persons were often about 15,000 EUR (and considerably less for physical persons). The analysis and evaluation of deficiency reports and mandatory reports under MARPOL for 2011 showed that globally the average fine imposed by port States for illegal discharge violations was just 5,220 EUR (min. 93 EUR; max. 678,940 EUR), and by flag States was even lower at an average of 2,680 EUR (min. 46.50 EUR; max. 21,090 EUR). As the absolute number of reported fines is low (171 by port States and 211 by flag States respectively), it is also likely that the few very high fines imposed distort the average.

This situation has changed since the amendment by Directive 2009/123/EC has strengthened the criminal law framework provided under Directive 2005/35/EC on ship source pollution and the penalties for infringements. Now the EU Member States have to impose criminal sanctions for illegal discharges in most cases; however the study shows that financial penalties are frequently not set high enough to dissuade vessels from polluting.

National laws regulate the procedure of collection of evidence, the evidence required, courts proper for such cases, as well as the amount of fines imposed or length of the potential imprisonment. National legislation varies considerably.

According to the EMSA report, Non-EU Member States can have even more diverse legislation as they are not bound by the requirements of the EU law. That means that even if all of them, as parties to MARPOL, had some system of penalizing illegal discharges, in some countries those sanctions may only be administrative. The particular national law and procedure should be consulted for more details.

If the investigation of a ship does not reveal enough evidence to prove that an illegal discharge has taken place, the investigation may reveal other irregularities and relevant measures or sanctions may be taken accordingly. All national laws contain other provisions for sanctioning, for example non-delivery of garbage (if from the ship’s documentation it seems that the garbage was discharged into the sea between the ports), as well as irregularities in ship’s log books and false statements as noted in the INTERPOL *Investigative manual for illegal oil discharges from vessels*, ‘when considering the charges to be brought against those illegally discharging oil from vessels, investigators and prosecutors should consider the full range of national laws available, including false statements and records, conspiracy, failure to report, concealing or obstructing an investigation, tax regulations or other applicable criminal statutes’³¹².

³¹⁰ See the position of the industry on the EMSA Report, in “ Reasons Illegal Discharges from Ships Occur, 3 December, 2013 by Officer of the Watch, <http://officerofthewatch.com/author/officerofthewatcheditor/>

³¹¹ OCDE 2003, DSTI/DOT/MTC(2002)8/FINAL.. There is a previous Report on Competitive Advantages Obtained by Some Shipowners as a Result of Non-observance of Applicable International Rules and Standards, 1996.

³¹² In 2002, INTERPOL launched the ‘Project Clean Seas’ to address illegal pollution from shipping managed by the INTERPOL Environmental Crime Programme. The Clean Seas Project group developed a state-of-

As the EMSA Report says “financial penalties are frequently not set high enough to dissuade vessels from polluting”. The aim of Directive 2009/123/EC was to strengthen the criminal law framework provided under Directive 2005/35/EC on ship source pollution and on the introduction of penalties for infringements. It widens the scope of that Directive by obliging Member States to introduce effective, proportionate and dissuasive sanctions for specific criminal offences related to ship-source pollution. In addition to the penalty itself, States should consider the possibility of recovering costs, including investigative and legal costs³¹³.

Case studies:

The practice regarding accidental oil spills

The failure to protect the oceans from accidental pollution has led its states parties to amend MARPOL or to go further through unilateral measures after the occurrence of catastrophes. The Erika and the Prestige accidents are referential to the study of the enforcement of MARPOL and, in particular, they illustrate the exceptions to its implementation, and the situations that called for subsequent reforms. The analysis of the Prestige and Erika cases shows the evolution of the EU legal answer to fight ship pollution and how the EU legislation has taken a different route from MARPOL in many aspects.

The Prestige case has been submitted to different jurisdictions that have applied and interpreted the international framework, from different angles and with different results that can lead to a fragmented and incoherent legal situation³¹⁴ that also has an important impact on the International Convention on Liability since the judgments will decide the criminal responsibility that will be decisive for civil liability claims and litigation. However, the competition among legal systems of adjudication are putting in jeopardy a respectful implementation of MARPOL, since it can be substituted or overruled by contracts and domestic rules in a case by case approach³¹⁵. Even though arbitration usually has less legal weight as precedent, the

the-art ‘Investigative Manual for illegal oil discharges from vessels’ and a training course for law enforcement officers using the manual as a guide. The project also develops networks for the sharing of intelligence on ship-sourced polluters and analysing effective enforcement responses by flag States receiving referrals of violations. The manual has recently been updated, Interpol. 2007. *Investigative manual for illegal oil discharges from vessels*, p. 65.

³¹³ EMSA Report 2012, p. 55.

³¹⁴ The UK Courts tried the claim of the insurance companies of the Prestige against Spain in the case *London Steam-Ship Owners' Mutual Insurance Association v Spain (The Prestige)* with the decision being given on October, 2013. The Court held that the insurers were entitled to bring damage claims brought by Spain and France in arbitration pursuant to the contract of insurance. In paragraph 187, the Judge considers that “Similarly there is here a real prospect of establishing the primacy of the award over any inconsistent judgment which may be rendered in Spain and therefore a clear utility in granting leave to enforce. The prospect of so establishing primacy is borne out by cases in which it has been stated - *The Wadi Sudr* [2010] 1 Lloyd’s Rep. 193 at [63] (per Waller LJ) - or assumed - *West Tankers* per Field J at [25-26] - that an award under s.66 is a “judgment” under s.34(3), and the decision to that effect of Beatson J in *African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2452 (Comm) at [27-28]. See *Case London Steam-Ship Owners' Mutual Insurance Association v. Spain* Case No: 2013-368, 2013-920, [2013] EWHC 3188 (Comm), 22.10.2013.

³¹⁵ The Court finally held, considering the Spanish claim for compensation for damages that the compensation would be granted according as stipulated by the contract of insurance:

“197. As to the points made about the importance of and the public interest in the Spanish proceedings, I recognise the significance of the issues raised and the claims made in those proceedings, but there cannot be one rule for publicly important cases and another for less important cases. I also recognise that, if no English law advice was taken prior to bringing the direct claims against the Club, the Defendants might be surprised to learn that they are bound to bring those claims in arbitration. However, the Club entered into an English law insurance contract on agreed terms and priced the cover provided accordingly. Those terms involve no liability in the events which have happened over and above the CLC liability, an international convention limit of liability which has been fully met. This Court has always upheld the principle of

competition among legal systems cannot be denied and forum shopping is widespread. These different legal outcomes can increase the separation between the responses adopted not just by the United States but even among the EU Member States involved in this catastrophe. The adjudication and jurisdictions has become disputed since Spain has tried in vain to choose the jurisdiction most cost effective for its interests.

However, the Prestige case and the various judgments have not applied MARPOL in full, even though there are many aspects referring to criminalising the actions of ship-owners and seafarers even in cases of unintentional acts. According to Art 230 UNCLOS, recognized rights of the accused shall be observed in the conduct of proceedings in respect of violations of pollution prevention laws. In this respect, the Prestige's Master brought before the European Court of Human Rights a claim against Spain for the 3 million euro of his bail³¹⁶. The ECHR assessed the international and European legal framework of reference before deciding that the Master's bail was justified considering that:

"86. Against this background the Court cannot overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences. This is demonstrated in particular by States' powers and obligations regarding the prevention of maritime pollution and by the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and, if appropriate, impose sanctions on them (...). A tendency can also be observed to use criminal law as a means of enforcing the environmental obligations imposed by European and international law.

88. In that connection the Court points out that the facts of the present case – concerning marine pollution on a seldom-seen scale causing huge environmental damage – are of an exceptional nature and have very significant implications in terms of both criminal and civil liability. In such circumstances it is hardly surprising that the judicial authorities should adjust the amount required by way of bail in line with the level of liability incurred, so as to ensure that the persons responsible have no incentive to evade justice and forfeit the security. In other words, the question must be asked whether, in the context of the present case, where large sums of money are at stake, a level of bail set solely by reference to the applicant's assets would have been sufficient to ensure his attendance at the hearing, which remains the primary purpose of bail. The Court agrees with the approach taken by the domestic courts on this point"³¹⁷.

However the third interveners –the London P&I Club, the insurers- expressed their concern regarding these positions considering that:

"74. [...] the criminal liability of a ship's Master and crew for acts giving rise to pollution was strictly regulated by UNCLOS and MARPOL 73/78 Referring to Article 230 of UNCLOS, [the London P&I Club] pointed out that custodial penalties were prohibited for acts of pollution committed beyond the territorial sea, that is to say, more than twelve miles from the coast. As an additional

freedom of contract and supported the enforcement of contractual bargains freely entered into. The Club is doing no more than seeking to enforce its contractual rights in respect of a claim which is in substance a claim under the contract that it made".

³¹⁶ The case originated in an application (no. 12050/04) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms by the Captain of Prestige of Greek nationality, Mr Apostolos Ioannis Mangouras, on 25 March 2004. The applicant alleged, in particular, that the sum set for bail in his case had been excessive and had been fixed without his personal circumstances being taken into consideration. He relied on Article 5 § 3 of the Convention which provides "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." See the Mangouras v. Spain, Judgement of 28 September 2010, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100686#%7B%22itemid%22:%5B%22001-100686%22%5D%7D>

³¹⁷ Ibidem.

safeguard against excessive action by the coastal State, UNCLOS provided a remedy in the form of an application for prompt release of a vessel or crew. In the three “prompt release” (fisheries-related) cases in which it had had jurisdiction – Camouco, Monte Confurco and Volga – the International Tribunal for the Law of the Sea had ordered the release of the crew³¹⁸.

In the case of the Erika 1999, there are some interesting aspects regarding MARPOL and the Law of the Sea Convention. As with the Exxon Valdes, France, like the US previously, expanded the coastal State’s competence to fight marine oil pollution caused beyond its territorial sea³¹⁹. This approach could have been challenged by the Flag state that in this case was Malta which had refused to prosecute. The consolidation of this approach led to the conviction of TOTAL and the imposition of a substantial fine³²⁰. This position meant that France applied a national legislation with more severe offences than those foreseen in MARPOL and with a wider scope covering non eligible areas under MARPOL competence such as the exclusive economic zone. The MARPOL Convention states that voluntary or involuntary oil leakages are forbidden for all ships. But in case of an accidental shipwreck, an exemption cause is possible, provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge, for the purpose of preventing or minimizing the discharge, except if the owner or the Master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result. As has been pointed out by academia, the French legislation enacts a very different offence, which is more severe than those foreseen in MARPOL. However, the French Supreme Court did not see any incompatibility between these rules since the French legislation complied with the goals and aims of the MARPOL and its Article 4 invites and further allows State parties to enforce rigorous legislations in order to dissuade possible offenders. This French legislation adopted in 1983³²¹ is also a consequence of and an answer to a previous oil pollution disaster, the AMOCO Cadiz that sunk like the Erika off the coast of Bretagne.

³¹⁸ See also para. 77 of the Judgment:

77. The third-party interveners’ representative expressed concern at the increasing criminalisation of seafarers’ actions, and referred in that regard to the Guidelines on fair treatment of seafarers in the event of a maritime accident, which called on States, inter alia, to: (a) take steps to ensure that seafarers, once interviewed or otherwise not required for a coastal State investigation following a maritime accident, were permitted to re-embark or be repatriated without undue delay; (b) consider non-custodial alternatives to pre-trial detention; and (c) make available a system for posting a reasonable bond or other financial security to allow for release and repatriation of detained seafarers pending resolution of any investigatory or judicial process. He stressed that decisions on the detention of seafarers should be taken solely in accordance with the latter’s personal circumstances and alleged actions and not on the basis of the possible consequences of those actions for the environment.

³¹⁹ This goal also inspires the Memorandum of Understanding of Paris that the EU promoted to increase the port state control’s competences to fight against flags of convenience.

³²⁰ TOTAL, the third biggest oil companies of the world and with French nationality, was found guilty of the criminal offense, alongside of the ship owner (Giuseppe Savarese, via his company Tevere Shipping), the ship manager (Antonio Pollara via his company Panship) and the certification company (Sp A Rina). Apart from the fines 370.000 euros for Total and Rina, 75.000 euros for MM. Savarese and Pollara), all four were sentenced to pay civil damages (200,6 million euros). In front of the Court of appeal, Total was exempted of paying these damages, but this part of the decision was broken by the Supreme Court

³²¹ See Cécile Bouche, Gwenaëlle Lafleur, Audrey San Jaime, “La responsabilité pénale en matière de pollution marine par hydrocarbures”, in *Actualité Juridique Pénal*, Dalloz Reviews, 2012, 3, 570, available at <http://www.dalloz.fr/documentation/lien?famille=revues&doctype=AJPEN/CHRON/2012/0120>

The consequences derived for MARPOL from the Erika case imply a “a break with the idea of letting the Flag State jurisdictions prevail on the coastal State’s in case of an accidental shipwreck in an EEZ”³²², that clearly calls for changes in MARPOL³²³.

6 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal

6.1 Introduction

The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal was adopted in 1989 in order to respond to growing international concern over the disproportionate environmental burdens borne by developing Countries from trade in hazardous wastes³²⁴.

The Convention has been signed by 104 Countries on 22 March 1989 and came into force the 5th of May 1992, after 20 Countries formally ratified the agreement³²⁵. At present, the Convention has 181 Parties and it constitutes a ground-breaking international environmental treaty that attempts to set right the unequal power equation that exists between the different players by regulating the hazardous waste trade. It does not seek to prohibit or restrict the hazardous waste trade, rather, the thrust is on providing a set of flexible regulatory principles³²⁶.

The Convention seeks to provide enhanced control over the transboundary movement of hazardous and other wastes, so that it may act as an incentive for environmentally sound management (ESM) and reduce

³²² Joan Baucells, Benoît Petit, “Possibilities and limits of environmental criminal protection”, *IndRET Revista Para el Anàlisis del Derecho*, 3 (2013), 14.

³²³ Baucells and Petit consider “to come back to criminal law considerations, this reform could also sustain a substantial change in the offense forbidden by the MARPOL convention. If the charterer is bound by a performance obligation, the conditions of use of Rule 11’s exemption cause could logically be modified in order to incorporate the charterer’s recklessness fault, alongside those of the ship owner and Master. This too, could change considerably the present state of shipwreck litigations”, *loc.cit.*, p. 15.

³²⁴ Katharina Kummer, “International Chemicals and Waste Management”, in *Research Handbook on International Environmental Law*, ed. Malgosia Fitzmaurice et al. (Cheltenham, Northampton: Edward Elgar, 2010), 637; Lisa Widawsky, “In My Backyard: How Enabling Hazardous Waste Trade to Developing Nations Can Improve the Basel Convention’s Ability to Achieve Environmental Justice”, *Environmental Law* 38 (2008): 577-625; Akiho Shibata, “Ensuring Compliance with the Basel Convention – its Unique Features”, in *Ensuring Compliance with Multilateral Environmental Agreements: a Dialogue between Practitioners and Academia*, ed. Beyerlin, Stoll, Wolfrum (The Netherlands: Martinus Nijhoff Publishers, 2006), 69-80; T.R. Subramanya, “The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989 and Related Developments: an Overview”, *The Indian Journal of International Law: a Quarterly* 46 (2006): 406-428. Sejal Choksi, “The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: 1999 protocol on Liability and Compensation”, *Ecology Law Quarterly* 28 (2001): 509-539 and Katharina Kummer, “The International Regulation of Transboundary Traffic in Hazardous Wastes: the 1989 Basel Convention”, *International and Comparative Law Quarterly* 41 (1992): 530-562.

³²⁵ Kummer, “The International Regulation”, 533-538 and Tony G Puthucherril, “Two Decades of the Basel Convention”, in *Routledge Handbook of International Environmental Law*, ed. Shawkat Alam et al. (London and New York: Routledge, 2013), 297.

³²⁶ *Ibid.*

the frequency of such movements³²⁷. The parties are obliged to adopt appropriate measures to minimize the generation of hazardous and other wastes and ensure adequate disposal facilities within the generating State. Such measures are intended to ultimately reduce the transboundary movement of wastes³²⁸.

6.2 The Institutional Structure

- The Secretariat: it assists the Parties in identifying illegal traffic, provides assistance to States in cases of emergency and receives and conveys information³²⁹. Parties provide the Secretariat with information, including an annual national report detailing all movement of wastes pursuant to the Convention, disposal methods, accidents, bilateral, multilateral or regional agreements entered with Parties or non-parties for the transboundary movement of hazardous or other waste and that do not derogate from ESM requirements and that take into account the interests of developing Countries³³⁰.
- The Conference of the Parties (COP): it represents the governing body of the Basel Convention and it comprises all States. The COP is empowered to take additional action to achieve the purposes of the Convention, to promote harmonization of policies, strategies and measures that seek to minimize harm to human health and to the environment from hazardous and other wastes. The COP adopts protocols and establish subsidiary bodies³³¹.

Furthermore, as it has been highlighted, “under Art. 14 the parties can, according to their specific needs of different regions or sub-regions, establish regional or sub-regional centers for training and technology transfer for the management of hazardous and other wastes and the minimization of their generation. A network of 14 Regional and Coordinating Centers for Capacity building and Technology transfer (BCRCs) has been established. The BCRCs are involved in training, dissemination of information, consultation, awareness-raising activities and technology transfer on matters relevant to the implementation of the Basel Convention and to the environmentally sound management of hazardous and other wastes in the Countries that they serve”³³².

6.3 Definitions

The Basel Convention provides for a broad definition of the term hazardous waste. As it has been reported, “[w]astes’ are defined as “substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law”³³³. A waste is hazardous if it is listed under Annex I, unless it does not possess any of the characteristics enumerated in Annex III, namely

³²⁷ “The concept of ESM finds concrete expression through a series of ‘technical guidelines’ developed in relation to the management of specific waste streams by the technical Working Group, a subsidiary body to the Conference of the Parties” (ibid., 298).

³²⁸ Ibid, 297.

³²⁹ Art. 16.

³³⁰ Art. 11. Trade with non-Parties not undertaken pursuant to Art. 11 is instead prohibited. Article 11 also can be interpreted to support regional agreements initiated by developing nations desiring a total ban on all importation of wastes into their region (Widawsky, “In My Backyard”, 589). In this regard it should be noted that the Basel Convention requires parties to prohibit the export of hazardous wastes to States, particularly developing Countries, which belong to an economic or political integration entity that has prohibited by legislation all such imports (Puthucherril, “Two Decades”, 300).

³³¹ Art. 15. See the dedicated website. Accessed September 12, 2013. <http://www.basel.int/TheConvention/ConferenceoftheParties/Meetings/COP11/tabid/3256/Default.aspx>

³³² Puthucherril, “Two Decades”, 301.

³³³ Art. 2(1).

flammability, explosivity, toxicity and eco-toxicity. Wastes that are not covered by this clause can still be considered as hazardous wastes if they are so considered under the national law of the Party of export, import or transit³³⁴. Radioactive wastes and wastes arising from the normal operation of a ship, which are governed by MARPOL 73/78 are excluded from its ambit. Annexes I and II list the wastes regulated under the Basel Convention (subject to the criteria mentioned in Annex III); Annexes VIII and IX clarify the specific wastes that can be covered by the Convention. Wastes that belong to any category contained in Annex II that are subject to transboundary movements shall be “other wastes”³³⁵. These generally include household wastes and their residuals. As far as the major actors in the trade are concerned, the Basel convention envisages five natural or legal persons that can be involved in the transport of hazardous wastes. The first is the “generator”, the entity whose activity has produced the wastes or, in cases where the entity is not known, the person who has possession or control over the wastes³³⁶. The second is the “exporter” who arranges for the export of hazardous wastes and is under the jurisdiction of the exporting State³³⁷. The “carrier” is the performing carrier³³⁸, while the “importer” is any person under the jurisdiction of the importing State who imports the hazardous wastes³³⁹. The final player, the “disposer”, receives the hazardous cargo for disposal³⁴⁰. These entities operate in a broad framework where the main drivers are the States of export³⁴¹, import³⁴² and transit³⁴³.

6.4 Minimizing Transboundary Movements under the Convention

As reported, “in order to minimize transboundary movement of hazardous and other wastes, the Basel Convention advocates both non-trade-based and trade-based measures. In terms of non-trade measures, the Basel Convention stressed reduction on the generation of hazardous and other wastes and disposal of such wastes in the Country of generation. In terms of trade-based measures for minimizing waste movements, Art. 4 gives each Party a right to prohibit the importation of any waste into its borders and impose upon each Party a corresponding obligation to not permit the export of wastes to any State of import that has not specifically consented to the specific import. The Basel Convention advances the tool of prior informed consent (PIC), which obligates each exporting Party to inform States of import of intended waste movements and receive written consent for each transfer from the State of import, in order to keep Transboundary movements to a minimum. A State of import has a “sovereign right” to refuse importation of any hazardous or other waste for any reason. Each State of export has an obligation to prohibit generators or exporters from commencing movements of wastes unless the State of export has received written consent and confirmation of a contract between the exporter and the disposer certifying environmentally sound management techniques from the State of import. Each State of export also has a duty to prohibit exportation, find and alternate facility, or re-import wastes if there is reason to believe the wastes will not be handled in an “environmentally sound manner” in the intended State of import. Art. 11 does permit the Parties to enter into bilateral, multilateral or regional agreements regarding movements of wastes with other Parties, or even non-Parties, but such movements are restricted by requirements that

³³⁴ Art. 1(1).

³³⁵ Art. 1(2).

³³⁶ Art. 2(18).

³³⁷ Art. 2(15).

³³⁸ Art. 2(17).

³³⁹ Art. 2(16).

³⁴⁰ Art. 2(19).

³⁴¹ Art. 2(10).

³⁴² Art. 29(11).

³⁴³ Art. 2(12). Puthucherril, “Two Decades”, 298-299.

the Secretariat must be notified and that such agreements must be at least as environmentally sound as the Convention requires. Trade with non-Parties not undertaken pursuant to Art. 11 is therefore prohibited. Also, notably, Art. 11 empowers developing nations desiring a total ban to create regional agreements to ban all waste importation to the region³⁴⁴.

The Basel Ban Amendment

At the second COP meeting in 1994 the Parties sought to introduce an immediate ban on the export of hazardous wastes for final disposal and of wastes from the Organization for Economic Co-operation and Development (OECD) to non-OECD Countries. As this decision was not incorporated into the Basel Convention text, there were doubts regarding its legal nature. Therefore, at the third COP meeting the Parties adopted the Ban Amendment, as well Annex II, by Decision III/1. This Decision bans export of hazardous wastes intended for final disposal and those for recycling from what are known as Annex VII Countries (Basel Convention Parties that are members of the EU or OECD and Liechtenstein) to non-Annex VII Countries (all other Parties to the Convention). In order to enter into force the ban amendment has to be formally adopted into the Basel Convention by ratification by three-fourths of the Parties who accepted it. However, the Ban Amendment has still not entered into force³⁴⁵.

The rationale behind the Ban Amendment consists in reducing waste production because generators will know they will not be able to export their wastes to the developing world and in reducing the distances wastes would have to travel by forcing the wastes produced in Annex VII Countries to stay in those nations.

As it has been stressed “even though the Basel Ban Amendment was welcomed as an important step in the movement towards environmental justice, it met with stiff resistance from several of the industrialized nations, in particular from the US. Despite being a signatory (as early as March 1990), and the US Senate having voted to ratify the Basel Convention, it subsequently reneged on its favorable disposition primarily because of its opposition to the Basel Ban Amendment. Surprisingly, several developing Countries also felt that the Ban unfairly deprived them of economic benefits that could flow into the fragile economies from the recovery of materials from hazardous wastes”³⁴⁶. For example “India and the Philippines have extracted lead from lead-acid batteries imported from the industrialized nations. This reclamation not only provides income for these Countries but also puts materials into use that would otherwise be sitting at a disposal site. In fact, India, Brazil, South Korea, the Philippines, and Malaysia all initially expressed opposition to the ban because it would threaten their sources of revenue and raw materials; South Korea even argued for an amendment retaining the right for industrialized nations to recycle with developing nations. In addition, after the Ban Amendment was adopted – without the support of the United States – at COP-3, several additional non-Annex VII nations that would not have been able to continue to receive hazardous wastes after the Ban was ratified, namely Monaco, Israel, and Slovenia – petitioned for Annex VII status in order to be able to continue to receive hazardous wastes despite the Ban, although his attempt was unsuccessful”³⁴⁷.

It has to be highlighted that the US currently maintains a multilateral agreement with the members of the OECD on the Control of Transboundary Movements of Wastes Destined for Recovery Operations. In addition, the US has established two bilateral agreements, with Canada and Mexico, for importing and exporting hazardous waste. Moreover, Costa Rica, Malaysia and the Philippines have entered into separate agreements with the US. Under these three agreements, the US may receive waste from Costa Rica, Malaysia, and the Philippines but may not export waste to these countries.

6.5 Enforcement: Illegal Traffic

The Basel Convention requires the State Parties to “consider criminal” illegal traffic that includes any transboundary movement of hazardous wastes or other wastes undertaken without compliance with the

³⁴⁴ Widawsky, “In My Backyard”, 588-589.

³⁴⁵ Puthucherril, “Two Decades”, 302. See the status of ratifications. Accessed September 17, 2013. <http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx>

³⁴⁶ Puthucherril, “Two Decades”, 303.

³⁴⁷ Widawsky, “In My Backyard”, 614.

provisions of the Convention³⁴⁸. It is interesting that the wording of Article 4(3) does not actually impose a clear obligation to make illegal traffic criminal. It simply says that parties “consider” it to be criminal (see further below).

Illegal traffic occurs if the transboundary movement of hazardous wastes is taking place under the following conditions:

- without notification pursuant to the provisions of the Convention to all States concerned;
- without the consent of a State concerned;
- through consent obtained by falsification, misrepresentation or fraud;
- when movement does not conform in a material way with the documents;
- or when movement results in deliberate disposal of hazardous wastes in contravention of the Convention and of general principles of international law³⁴⁹.

Common methods of illegal traffic include making false declarations, the concealment, mixture or double layering of the materials in a shipment and the mislabelling of individual containers. Such methods seek to misrepresent the actual contents of a said shipment and, because of this the meticulous and thorough scrutiny of national enforcement officers is required to detect cases of illegal traffic³⁵⁰.

If the illegal traffic arises as a result of conduct on the part of the importer or disposer, the State of import shall be responsible for ensuring that the wastes are disposed of in an environmentally sound manner by the importer or disposer, or if necessary by itself. Likewise, if the illegal traffic is deemed to result from the conduct on the part of the exporter or generator, the State of export shall ensure that the wastes are taken back, or, if impracticable, disposed of in accordance with the provisions of the Convention. However, where responsibility for illegal traffic cannot be assigned to the generator, exporter, importer or disposer, the Parties concerned or other Parties are to ensure that disposal is effected in an environmentally sound manner³⁵¹.

The Secretariat is not mandated to take a unilateral decision to intervene when a case of alleged illegal traffic is brought to its attention. Under Article 16 (1)(i) of the Convention, the Secretariat’s functions include assisting Parties, upon request, in the identification of cases of illegal traffic and to circulate immediately to the Parties concerned any information it has received regarding illegal traffic. Also, under Article 19 of the Convention, any Party which has reason to believe that another Party is acting or has acted in breach of its obligations under the Convention may inform the Secretariat thereof, and in such an event, shall simultaneously and immediately inform, directly or through the Secretariat, the Party against whom the allegations are made. The Secretariat should then submit all relevant information to the Parties³⁵².

6.6 Ensuring Compliance

The Basel Convention has established a Compliance Mechanism that first convened in 2003. It is “non-confrontational”, “non-binding”, “preventive in nature” in order to review collected information to monitor compliance and to assist Parties with achieving compliance³⁵³.

³⁴⁸ Art. 4(3). See the dedicated website. Accessed September 17, 2013. <http://archive.basel.int/legalmatters/illegtraffice/index.html>

³⁴⁹ See the dedicated website. Accessed September 17, 2013. <http://archive.basel.int/legalmatters/illegtraffice/index.html>

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ See the dedicated website. Accessed September 17, 2013. <http://www.basel.int/TheConvention/ImplementationComplianceCommittee/Overview/tabid/2868/Default.aspx>. See also Alessandro Fodella, “Mechanism for Promoting Implementation and Compliance with the 1989 Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal”, in *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental*

The Committee has two main functions: to address “specific submissions” and to review “general issues of compliance and implementation”. The Committee examines specific submissions relating to a specific Party’s failure to comply, presented by the Parties (without limitations as to the subject-matter), or by the Secretariat (only as to the Parties’ reporting obligations under the Convention) with a view to determining the facts and causes of non-compliance, and to assisting the Party by providing it with advice, non-binding recommendations and information. Should this be not enough, the Committee may recommend additional measures to be adopted by the COP.

In their tenth meetings that the COP and the Implementation and Compliance Committee celebrated in Paris the 5 and 6 December 2013, the Committee presented its Report on the 10 years of practice of the mechanism of compliance of the Basel Convention, “*The Basel Convention Mechanism for Promoting Implementation and Compliance. Celebrating a Decade of Assistance to the Parties*”³⁵⁴. It resumes and assesses the cases on the three specialised types of submissions to the Implementation and Compliance Committee: Party Self-Submission, Party to Party Submission and the Secretariat Submission.

As to Party Self-Submission, the Committee did not receive any such submission by the time of the CoP9 in 2008. This situation led the CoP9, following the recommendations of the Committee, to address the lack of specific submissions in a twofold manner (decision IX/2). First, the CoP mandated the Committee to address existing shortcomings and limitations in relation to the lack of specific submissions to the Committee, in particular as they may result from the existing options to trigger the mechanism, the lack of resources to assist Parties that are determined to be facing difficulties in implementation and compliance, and the need to promote a better understanding of the facilitative nature of the mechanism.

Second, the CoP decided to enlarge the scope of the Trust Fund to Assist Developing Countries and other Countries in Need of Technical Assistance in the Implementation of the Basel Convention (Technical Cooperation Trust Fund) and established an implementation fund to assist any Party that is a developing country or country with an economy in transition and is the subject of a submission made in accordance with the terms of reference of the Committee.

Following the CoP, the Committee received one self submission by Oman with respect to its difficulties in implementing and complying with its obligation to submit annual reports in accordance with paragraph 3 of Article 13 of the Convention. The Committee in its Decision 9/1 welcomed the agreement by Oman to prepare a voluntary compliance action plan with the assistance of the Secretariat by the CoP 11 for its approval, which, if approved by the Committee, would make Oman eligible for funding under the implementation fund³⁵⁵.

Agreements, ed. Tullio Treves et al. (The Hague: T.M.C. Asser Press, 2009), 33-48 and Akiho Shibata, “Ensuring Compliance with the Basel Convention – its Unique Features”, in *Ensuring Compliance with Multilateral Environmental Agreements*, ed. Ulrich Beyerlin et al. (Leiden, Boston: Martinus Nijhoff Publishers, 2006), 69-87.

³⁵⁴ This document presents a brief overview of the activities of the Implementation and Compliance Committee carried out during the period 2002 – 2011. It complements the brochure entitled “The Basel Convention Mechanism for Promoting Implementation and Compliance” published in 2006, which is intended to be a brief guide for Parties to explain the procedures of the Committee, available at <http://www.basel.int/Implementation/LegalMatters/Compliance/OverviewandMandate/tabid/2308/Default.aspx>

³⁵⁵ See Decision available at <http://www.basel.int/Implementation/LegalMatters/Compliance/SpecificSubmissionsActivities/tabid/310/Default.aspx>

As to Party to Party submission, so far no Party has made use of the possibility under paragraph 9 (b) of the Committee's terms of reference to make a submission regarding another Party³⁵⁶.

As to the Secretariat submission, in nine instances, the Secretariat has made use of the possibility provided for in paragraph 9 (c) of the Committee's terms of reference to make a submission to the Committee. The submissions were made on the basis of the Secretariat's awareness of possible difficulties of these Parties in complying with its obligations under paragraph 1 of Article 3 (notification of national definitions), paragraph 1 of Article 4 (notifications of an import prohibition), Article 5 (designation of a focal competent and of a competent authority) and paragraphs 2 and 3 of Article 13 of the Convention (transmission of information, including national reporting). The submissions were preceded by consultations with each Party concerned: Buthan, Cape Verde, Eritrea, Guinea Bissau, Liberia, Libya, Nicaragua, Swaziland and Togo.

In the case of Nicaragua, the Committee after receiving its national report concluded that the matter of concern as set out in the submission has been resolved³⁵⁷

In the cases of Buthan and Togo³⁵⁸, the Committee approved for funding the following elements of their compliance action plans and decided that resources in the implementation fund of up to USD 50,000 each may be used for the purpose of covering costs associated with:

- (a) Training on the development of inventories;
- (b) The establishment of the methodology for the inventory (including systems and databases);
- (c) The development of an inventory³⁵⁹.

In the cases of Cape Verde, Eritrea, Guinea Bissau, Liberia, Libya and Swaziland due to the continue lack of minimal compliance, the Committee requested the Secretariat to send a letter to their Ministries of Foreign Affairs reminding these parties of their reporting obligations under Article 13, and/or their obligation under Article 5 of the Convention to designate a focal point and a competent authority, and to explore other ways to ensure communication with them using inter alia the Commissioner of the African Union, the relevant Basel Convention Regional Centre and the relevant meetings of Convention bodies served by the Secretariat³⁶⁰.

³⁵⁶ Art. 9.3 considers the possibility that a Party that "has concerns or is affected by a failure to comply with and/or implement the Convention's obligations by another Party with whom it is directly involved under the Convention". A Party intending to make a submission under this subparagraph shall inform the Party whose compliance is in question, and both Parties should then try to resolve the matter through consultations.

³⁵⁷ See Decision CC 8/8: Nicaragua, available at <http://www.basel.int/Implementation/LegalMatters/Compliance/SpecificSubmissionsActivities/tabid/2310/Default.aspx> the matter of concern as set out in the submission has been resolved

³⁵⁸ See Decision CC-9/2: Submission regarding Buthan and Decision CC-9/9: Submission regarding Cape Verde, available at <http://www.basel.int/Implementation/LegalMatters/Compliance/SpecificSubmissionsActivities/tabid/2310/Default.aspx>

³⁵⁹ See the Committee's decisions: CC Decisions, available at <http://www.basel.int/Implementation/LegalMatters/Compliance/SpecificSubmissionsActivities/tabid/2310/Default.aspx>

³⁶⁰ See Decision CC-9/3: Submission regarding Cape Verde, Decision CC-9/4: Submission regarding Eritrea, Decision CC-9/5: Submission regarding Guinea Bissau, Decision CC-9/6: Submission regarding Liberia, Decision CC-9/7: Submission regarding Libya, Decision CC-9/8: Submission regarding Swaziland, available at

With the support of a financial contribution from the European Union, the Secretariat hired the services of a consultant to assist with the preparation of the classification of parties' compliance performance with respect to the annual reporting obligations for 2011. The report and the annexes that were elaborated showed that the national reporting targets for the year 2011 approved by the CoP in 2008 have not been met.

The Committee has asked the Secretariat to publish these annexes on the website with an explanatory note and to make the information available to parties through a communication with an invitation to comment on the classification by 31 March 2014.

6.7 The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Wastes and their Disposal

The Basel protocol on Liability and Compensation for Damage resulting from Transboundary Movements was adopted by the fifth COP in 1999 and it has not entered into force yet³⁶¹. So far it only attracted 13 signatories and 11 ratifications³⁶², therefore, its entering into force seems quite unlikely.

The Protocol seeks to provide a comprehensive regime to address liability issues and to provide for compensation that is prompt and adequate for damages consequent to transboundary movement of hazardous and other wastes and also for incidents that happen due to illegal traffic.

The Protocol uses both strict and fault based liability models. As it has been highlighted "it applies only to damage resulting from the transboundary movement and disposal of hazardous waste. Under the Protocol no single operator is liable at all stages, nor is the generator always liable. Instead, generators, exporters, importers and disposers are all potentially liable at different stages of the waste's journey to its eventual destination. When the waste is in transit during export the person who notifies the appropriate authorities of a State of the proposed transboundary movement of (such) waste would be liable; thereafter the disposer of waste would assume liability. In instances where the waste is classified as hazardous only in the State of import, then the importer of such waste would be liable until the disposer takes possession of it. In regard, to the principle of strict liability envisaged in the Protocol it may be said that the person or firm who filed the notification of the transportation of the hazardous waste with the appropriate authorities is strictly liable until the material is handed over to the ultimate disposer. The disposer is strictly liable when the waste is under his control. [...] [W]here several parties are involved in waste trade, liability is joint and several. But when this provision is subject to limited exceptions. For example, national law determines liability limits. However, the Protocol provides a minimum level of compensation in accordance with a formula based on the amount of the waste and insists on compulsory insurance or other financial guarantee. Art. 5 of the Protocol limits the principle of fault-based liability. It could cover cases related to 'wrongful, intentional, reckless or negligent, acts or omissions'. The Protocol provides for the setting up of a fund established by the Conference of the Parties. The finance of this fund would come from voluntary contributions made by the Parties to the Basel Convention. The question of liability will be determined by ordinary Courts. Jurisdiction could be exercised by the national courts in the Country in

<http://www.basel.int/Implementation/LegalMatters/Compliance/SpecificSubmissionsActivities/tabid/2310/Default.aspx>

³⁶¹ See the dedicated website. Accessed September 18, 2013. <http://www.basel.int/Implementation/LegalMatters/LiabilityProtocol/tabid/2399/Default.aspx>

³⁶² See the list of Parties and Signatories at <http://www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/Default.aspx>. Accessed February 13, 2014.

which the damage was suffered, in which the incident occurred or at the principal place of business of the defendant. It also provides for the mutual recognition and enforcement of judgments. These provisions prevent Parties from using procedural devices to avoid the responsibility for damage caused by their waste. States in the event of accepting this Protocol are required to enact legislation to implement civil liability rules within their domestic sphere³⁶³.

6.8 Punishment

The Basel Convention is one of the few environmental treaties to define a prohibited activity as “criminal” even though the wording of Article 4(3) does not impose a clear obligation to make illegal traffic criminal, as it simply says that parties “consider” it to be criminal (see also above).

According to the Secretariat, the fact that illegal traffic is deemed a crime that Parties undertake to prevent and punish says a lot about the international community’s commitment to the environmentally sound management of hazardous and other wastes. Illegal traffic of hazardous waste is unfortunately still very common in all corners of the world³⁶⁴.

Art. 4 of the Convention states that the Parties “consider” illegal traffic in hazardous wastes or other wastes as criminal and requires each Party to take appropriate legal, administrative and other measures to prevent and punish such conducts:

(3) The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal.

(4) Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.

Furthermore, the Convention requires that Parties cooperate when dealing with illegal traffic (Art. 9(5)).

It has to be noted though that each State has its own, necessarily different, means of investigation, compliance and enforcement and of effecting legislation to define penalties according to its own established framework. The application of national offences and penalties to the various actors involved in a transboundary movement has to be set out in the national legal framework. Similarly, how far the powers of a prosecutor and the jurisdiction of a court can extend to such actors who are physically or legally established in a foreign country is a matter for national legislation to clarify. However, Part VII of the Model National Legislation³⁶⁵ provides some guidance and contains model provisions on illegal traffic³⁶⁶.

One of the major problems faced by the actors involved in the fight against illegal traffic is to prove the existence of a “waste” that is “hazardous”. Under the Basel Convention, a substance or an object is waste if it is disposed of, intended to be disposed of or if it is required to be disposed of by the provisions of national law. This definition clearly relies on subjective elements that are difficult to assess.

³⁶³ T.R. Subramanya, “The Basel Convention”, 424-425.

³⁶⁴ See the dedicated website. Accessed October 9, 2013, <http://www.basel.int/Implementation/LegalMatters/IllegalTraffic/Overview/tabid/3421/Default.aspx>

³⁶⁵ Accessed October 9, 2013, <http://archive.basel.int/pub/modlegis.pdf>

³⁶⁶ In addition, an instruction manual on the prosecution of illegal traffic of hazardous wastes or other wastes has also been adopted in 2012: *Basel Convention Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes or other Wastes*, Secretariat of the Basel Convention and UNEP, <http://www.basel.int/DNNAdmin/AllNews/tabid/2290/ctl/ArticleView/mid/7518/articleId/729/Instruction-manual-on-the-prosecution-of-illegal-traffic-of-hazardous-wastes-or-other-wastes.aspx>

6.9 International Cooperation

Various international organizations are concerned with the enforcement of international agreements on hazardous and other wastes. Several networks strengthen the ability of Parties to prevent and combat illegal traffic³⁶⁷. Among these, ENFORCE has to be mentioned³⁶⁸. ENFORCE is a network of relevant experts established by the eleventh COP which aims at promoting parties' compliance with the provisions of the Basel Convention pertaining to preventing and combating illegal traffic in hazardous wastes and other wastes through the better implementation and enforcement of national law. ENFORCE also aims at improving cooperation and coordination between relevant entities with a specific mandate to deliver capacity-building activities and tools on preventing and combating illegal traffic. The establishment of ENFORCE was recommended by the Basel Convention Implementation and Compliance Committee and endorsed by the eleventh COP in May 2013. The first meeting of ENFORCE is scheduled to take place in November 2013 in Bangkok³⁶⁹.

In addition, a variety of international organizations and networks focus on preventing and combating the illegal traffic in hazardous and other wastes, such as INTERPOL³⁷⁰ and the United Nations Office on Drugs and Crime (UNODC)³⁷¹.

6.10 The Role Played by the NGOs

NGOs play a considerable role in gathering, compiling and disseminating relevant information to policy-makers and the broader public. NGOs, such as Basel Action Network,³⁷² have established large networks of individuals and NGOs engaged in a specific policy area on all levels of governance.

It has been reported that an international network of activists and NGOs documented the ineffectiveness of the original "prior informed consent"-procedure with respect to the transboundary movements of hazardous wastes. Based on this information the third COP in 1995 formally amended the Convention (even though the amendment has not entered into force yet – see above) by a general prohibition to ship hazardous wastes from industrialised to developing countries³⁷³.

As to the participation in COP meetings as observers, Art. 15 (6) of the Convention provides that "[a]ny other body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to hazardous wastes or other wastes which has informed the Secretariat of its wish to be

³⁶⁷ See the dedicated website. Accessed October 9, 2013, <http://www.basel.int/Implementation/LegalMatters/IllegalTraffic/InternationalCooperation/tabid/3425/Default.aspx>

³⁶⁸ See the dedicated website. Accessed October 9, 2013, <http://www.basel.int/Implementation/LegalMatters/IllegalTraffic/Meetings/Bangkok,Thailand18to19November2013/tabid/3458/mctl/ViewDetails/EventModID/8927/EventID/420/xmid/10855/Default.aspx>

³⁶⁹ Ibid.

³⁷⁰ Accessed October 9, 2013, <http://www.basel.int/Implementation/LegalMatters/CountryLedInitiative/OutcomeofCOP10/Combatinillegaltraffimoreeffectively/EnforcementNetworks/INTERPOL/tabid/3014/Default.aspx>

³⁷¹ Accessed October 9, 2013. <http://www.unodc.org/>

³⁷² Accessed October 9, 2013, <http://www.ban.org/>

³⁷³ See the study conducted by Ecologic - Institute for International and European Environmental Policy and by Foundation for International Environmental Law and Development, "Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience" (2002), available online. Accessed October 9, 2013. http://www.ecologic.eu/download/projekte/1850-1899/1890/report_ngos_en.pdf

represented as an observer at a meeting of the Conference of the Parties, may be admitted unless at least one-third of the Parties present object”³⁷⁴.

6.11 The Role Played by the European Union

The European Union, together its MS, has been a Party to the Basel Convention since 1994³⁷⁵. It implemented the Basel Convention through, inter alia, Regulation 1013/2006³⁷⁶.

This Regulation “distinguishes between shipments of waste between the MS and shipments into and out of the EU. Concerning the latter a further distinction is made between EFTA Countries, OECD Decision-countries and non-OECD Decision Countries. A second important distinction relates to the recovery or disposal that the waste will be subjected to following the shipment. Basically this means that shipments destined for recovery benefit from less restrictions compared to shipments destined for disposal”³⁷⁷. It is important to notice that there are categories of waste to which different regimes apply. The Basel Regulation distinguishes between green list (Annex III) and an amber list (Annex IV). In addition, there is a list of wastes where the export is prohibited (Annex V). Shipments of green list waste are subject to a general information requirement, whereas shipments of amber list waste are subject to a prior informed consent procedure³⁷⁸.

As far as the provisions on penalties are concerned Art. 50 deals with “enforcement in Member States” and states that “1. Member States shall lay down the rules on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify the Commission of their national legislation relating to prevention and detection of illegal shipments and penalties for such shipments. 2. Member States shall, by way of measures for the enforcement of this Regulation, provide, *inter alia*, for inspections of establishments and undertakings in accordance with Article 13 of Directive 2006/12/EC, and for spot checks on shipments of waste or on the related recovery or disposal. 3. Checks on shipments may take place in particular:

- (a) at the point of origin, carried out with the producer, holder or notifier;
- (b) at the destination, carried out with the consignee or the facility;
- (c) at the frontiers of the Community; and/or
- (d) during the shipment within the Community.

4. Checks on shipments shall include the inspection of documents, the confirmation of identity and, where appropriate, physical checking of the waste. 5. Member States shall cooperate, bilaterally or multilaterally, with one another in order to facilitate the prevention and detection of illegal shipments. 6. Member States shall identify those members of their permanent staff responsible for the cooperation referred to in paragraph 5 and identify the focal point(s) for the physical checks referred to in paragraph 4. The information shall be sent to the Commission which shall distribute a compiled list to the correspondents referred to in Article 54. 7. At the request of another Member State, a Member State may take enforcement action against persons suspected of being engaged in the illegal shipment of waste who are present in that Member State”.

³⁷⁴ Ibid.

³⁷⁵ See the dedicated website. Accessed September 18, 2013. <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/1290/Default.aspx> and http://europa.eu/legislation_summaries/environment/waste_management/l28043_en.htm

³⁷⁶ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste. *OJ L 190, 12.7.2006*, p. 1–98.

³⁷⁷ Jans and Vedder, *European Environmental Law*, 493.

³⁷⁸ Ibid.

With regards to the provisions on criminal offences and sanctions, as introduced by the Directive 2008/99/EC, see the European level report.

The ECJ Case Dusseldorp:

In its judgment of 25 June 1998³⁷⁹, on a preliminary ruling on the interpretation of EU legislation on the supervision and control of shipments of waste within, into and out of the European Community³⁸⁰, the ECJ adopted a position on shipments of waste for recovery and the principles of self-sufficiency and proximity in light of the Basel Convention. After examining the EU legal framework as well as the Basel Convention, the Court held that the EU legislation was to be interpreted as meaning that the principles of self-sufficiency and proximity do not apply to waste for recovery in view that:

“... the difference in treatment between waste for disposal and waste for recovery reflects the different roles played by each type of waste in the development of the Community's environmental policy. By definition, only waste for recovery can contribute towards implementation of the principle of priority for recovery laid down in Article 4(3) of the Regulation. It was in order to encourage such recovery in the Community as a whole, in particular by eliciting the best technologies that the Community legislature stipulated that waste of that type should be able to move freely between Member States for processing, provided that transport poses no threat to the environment. It therefore introduced for intra-Community shipment of that waste a more flexible procedure, which does not reflect the principles of self-sufficiency and proximity”³⁸¹.

Moreover, the Court interpreted the waste disposal operations and waste recovery operations regarding the EU competition law and precluded:

“... rules such as the Long-term Plan whereby a Member State requires undertakings to deliver their waste for recovery, such as oil filters, to a national undertaking on which it has conferred the exclusive right to incinerate dangerous waste unless the processing of their waste in another Member State is of a higher quality than that performed by that undertaking if, without any objective justification and without being necessary for the performance of a task in the general interest, those rules have the effect of favouring the national undertaking and increasing its dominant position”³⁸².

6.12 Case studies: BASEL Convention

6.12.1 The Trafigura case

The landmark of the practice of the Basel Convention is the hazardous waste discharge of the company TRAFIGURA's ship Probo Koala in Cote d'Ivoire in 2006 causing 11 casualties and over 100.000 injuries³⁸³. This case shows clearly the rationale of environmental crimes committed in the framework of the Basel

³⁷⁹ See Judgment of 25 June 1998, Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV and Others and Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, I- 4111, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=43963&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=46315#Footnote1>

³⁸⁰ On the interpretation of Articles 34, 86, 90 and 130t of the EC Treaty, of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32), and of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, *OJ1993 L 30*, p. 1.

³⁸¹ Para. 33 of the Judgment of 25 June 1998.

³⁸² Second paragraph of the Conclusions of the Court in its Judgment of 25 June 1998.

³⁸³ See Greenpeace Website. <http://www.greenpeace.org/international/en/campaigns/toxics/trafigura/>. Accessed February 18, 2014.

Convention³⁸⁴ and how multinationals can go unpunished. As a matter of fact, independently from the action taken by the states concerned and the rest of the parties in the institutional framework of the Basel Convention, this case has involved different developments before various national jurisdictions – the Netherlands, Côte d’Ivoire and UK courts³⁸⁵.

The waste was originally brought to the Netherlands, but Trafigura turned down the option to have it properly treated there because it thought the price quoted was too high³⁸⁶. Despite concerns about the waste, the Dutch authorities let it leave the Netherlands. Trafigura’s decision to dispose of the waste in Abidjan was taken after other options had failed. The company chose Abidjan despite the fact that the city did not have the required facilities for MARPOL waste and was a prohibited destination for Basel waste. However, the Trafigura company has always argued that those facilities were adequate for the waste treatment. The International Maritime Organization (IMO) maintains a database of reception facilities at ports around the world so that mariners can establish whether a particular port’s facilities are adequate for the type of waste they are seeking to dispose of. The entry for Abidjan shows no facilities listed. The fact that Abidjan does not have appropriate facilities was confirmed by independent experts. A technical assistance mission to Ivory Coast mandated by the Basel Convention Secretariat, found that: “the Abidjan port is not equipped with the necessary facilities for the offloading and treatment of wastes covered by the MARPOL Convention”³⁸⁷.

The waste on board the Probo Koala was not MARPOL waste. But even if it had been, it should only have been treated in countries that had the appropriate facilities. Ivory Coast did not possess any facilities of this type. Achim Steiner, U.N. Under-Secretary and Executive Director of the U.N. Environment Program (UNEP), said: “The toxic waste dumping in Abidjan underlines many remaining challenges including the urgency of strengthening the U.N. treaties covering shipping and hazardous wastes, specifically MARPOL and UNEP-administered Basel Convention. This should include clarification of the respective scope of application of these treaties”.³⁸⁸

Trafigura in the Netherlands: on 23 July 2010, a Dutch court fined Trafigura one million euros for illegally exporting toxic waste. The ruling also included individual convictions of the captain of the ship involved and a Trafigura employee. However, this ambiguous verdict has been criticized³⁸⁹: “the trial involved

³⁸⁴ See Antonio Cardesa-Salzmann, *Journal of Environmental Law*, vol. 2010, p.

³⁸⁵ See Greenpeace Website. <http://www.greenpeace.org/international/en/campaigns/toxics/trafigura/>. Accessed February 18, 2014.

³⁸⁶ “The company tried to dispose of the waste using Amsterdam Port Services, describing it as routine ship’s slops. As the waste began to be pumped ashore, the obnoxious smell triggered an emergency services response. The offloading was suspended and the waste analysed. The company was told it would cost €400,000 to treat the waste safely. Rather than pay this, the company pumped the waste back on board and looked for an alternative method of disposal. The alternative the company came up with was to use the services of a local company, Tommy, to dump the waste at 14 dump sites around the port city of Abidjan, in the West African country of Ivory Coast. Following the dumping of the waste in September 2006, the city was overwhelmed by a terrible stench, and tens of thousands of people began reporting medical problems, such as breathing difficulties and running eyes. The health emergency led to the resignation of the Ivorian government cabinet”, See Barry Mason, “Trafigura found guilty in Ivory Coast waste-dumping case”, [wsws.org](http://www.wsws.org), 05.08.2010, available at <http://www.wsws.org/en/articles/2010/08/ivor-a05.html?view=print>.

³⁸⁷ Ibidem.

³⁸⁸ Greenpeace and Amnesty International, *The Toxic Truth*, 25 September 2012, p. 87, available on internet at <http://www.greenpeace.org/international/en/publications/Campaign-reports/Toxics-reports/The-Toxic-Truth/>, 6 December 2013.

³⁸⁹ See Frédéric Mégret, loc. cit., p. 202.

charges of concealing the 'harmful nature' of ship-borne waste as it transited through Amsterdam, rather than the actions of the company and its agents in Ivory Coast where the harm actually occurred. The individual sentences reflect the lesser gravity of such offences: a five year suspended jail term for the Captain of the ship carrying the toxic waste, and a 25.000 euro fine for the employee in charge of operations at Amsterdam harbour³⁹⁰.

On the basis of Article 18.1 of the EU Council Regulation on the supervision and control of shipments of waste within, into and out of the European Union, "all exports of waste to ACP States shall be prohibited". Ivory Coast is one of these states. The EU Regulation is binding in its entirety and directly applicable in all Member States. Besides under the Basel Convention, the public prosecutor's office must prosecute the offences committed by Trafigura Beheer B.V. and others in Ivory Coast. This Convention prohibits the export of hazardous waste to developing countries when one must assume that the waste cannot be processed in a responsible way. Article 4.3 and 4 stipulate that the illegal export of hazardous waste is actionable and that State Parties are under an obligation to punish violation of this convention.

The Dutch Department of Public Prosecutions conducted an investigation in Ivory Coast shortly after the dumping of waste in 2006. At the time, the Department of Public Prosecutions found that a lack of evidence and the difficult circumstances made prosecution impossible.

Greenpeace Netherlands sought to compel the Dutch Department of Public Prosecutions to indict Trafigura for acts of illegal dumping, but on 15 April 2011, an Appellate court upheld the prosecutor's decision to refrain from filing charges, finding that prosecution was neither feasible nor opportune, in part because it was not evident that Ivory Coast would cooperate³⁹¹. In addition, the Netherlands had made considerable efforts to conduct an investigation, submitting requests to Ivory Coast for legal assistance. The Department of Public Prosecutions has a certain amount of discretion in deciding whether or not to prosecute.

Trafigura Netherlands has always argued that they sent the Probo Koala to Abidjan because "[u]nder Regulation 38 of the MARPOL Convention, to which Ivory Coast was a signatory, slops handling would be standard practice at a major oil port like Abidjan"³⁹².

Trafigura in Ivory Coast: in 2007, an out of court settlement was reached with the government of Ivory Coast granting Trafigura immunity from prosecution, so Trafigura has never had to answer to the courts in Ivory Coast because the company paid the government €152 million, which resulted in the termination of the civil proceedings in which damages were claimed from the oil company, and Trafigura avoided criminal prosecution. Although Trafigura explicitly denies that the settlement involved agreements about protection from criminal proceedings. A number of Africans were prosecuted, with two people being condemned to prison sentences of five and twenty years.

³⁹⁰ In addition to the fine imposed on the company, Trafigura employee Naeem Ahmed was fined €25,000, and ship's captain Sergiy Chertov was given a 5-year suspended jail sentence.

³⁹¹ Greenpeace Netherlands, *Trafigura Avoids Prosecution for Dumping Waste in Ivory Coast*, EUR. COALITION FOR CORP. JUST., available on internet at http://www.corporatejustice.org/spip.php?page=article&id_article=781&lang=en, last visited 6 December 2013.

³⁹² Trafigura also argues that "Indeed, Abidjan is one of the largest and most sophisticated ports in west Africa: in 2006, the port handled a total of 18 million tonnes of goods. It has handled oil-related cargoes since 1965; in addition to the SIR oil refinery (which has an operating capacity of approximately 22 million barrels of crude oil per annum), there is a separate bitumen plant run by SMB. The Ivory Coast is also a crude oil exporting country. Trafigura, as well as other major oil companies, such as Shell and Total, have been operating in the Ivory Coast for decades. Consequently, the port was experienced in dealing with slops from oil tankers and vessels, and in 2006 more than 30,000 tonnes of slops were safely unloaded at Abidjan". See the position of Trafigura in its website, at <http://www.trafigura.com/media-centre/probo-koala/12841/>

For its part, Ivory Coast did not trigger the Basel Convention Non Compliance Procedure (NCP), but requested assistance from the Convention's Technical Cooperation Trust Fund, under which an *ad hoc* technical commission was established in order to assist that country in the assessment of the damage to human health and the environment arising from the dumping.

After its in-country visit, the NCP commission found that it was 'unable, at that stage, to establish whether or not the discharging of waste from the Probo Koala constituted illegal transboundary movement of hazardous wastes as defined by the Basel Convention', but stated that: [w]ithout prejudging which international body is competent to rule on the case, serious lapses ha[d] occurred in the application of the relevant regulations, whether under the Basel Convention, the MARPOL Convention or the Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa"³⁹³.

During the Basel Convention's CoP9 in 2008 held while the NCP commission was in Ivory Coast, the Parties did not refer the matter to the Implementation and Compliance Committee either, but merely called for countries and stakeholders to provide technical and financial assistance to Ivory Coast to implement its emergency plan for the clean-up and assessment of the damage on the ecosystems, its follow-up, and the investigation to establish responsibilities. Eventually, the Netherlands contributed with E1million to the fund established by the executive director of UNEP under decision VIII/1, without expressly recognising any sort of responsibility in the matter.

Trafigura in the UK: because the main company of Trafigura is a London-based , a civil claim was brought in the UK on behalf of some of the victims, in 2009. Circumventing this new jurisdiction, Trafigura reached another settlement with no admission of liability. The company made another out-of-court settlement of \$50 million to Abidjan inhabitants who had suffered health problems after the dumping of the waste. This was the result of a class action brought by the solicitors Leigh Day³⁹⁴.

In September 2012, Amnesty International and Greenpeace Netherlands demanded that the British government open a criminal investigation into the dumping of toxic waste by Trafigura, after releasing their report, *The Toxic Truth*, which is the result of a three-year investigation³⁹⁵. This report provides details on how existing laws aimed to prevent such tragedies were flouted, with several governments failing to halt the progress of the Probo Koala and its toxic cargo towards Abidjan. The report further challenges the legality of the settlement in Ivory Coast that apparently allowed Trafigura to evade prosecution for its role in the dumping of the toxic waste. It also calls upon the Ivorian government to ensure that the victims receive full compensation. Further, it was called upon to reassess the legality of the agreement it made that apparently gave Trafigura sweeping immunity from prosecution.

As Wouter and Reign argue "UK is traditionally the EU Member State where most of the tort cases against (parent) corporations have been launched by foreign victims for damages sustained abroad. One can only

³⁹³ Report of the Basel Convention Secretariat's technical assistance mission to Ivory Coast, 20 November 2006-1 December 2006, in the context of Decision V/32. UN Doc UNEP/CHW/OEWG/6/2 (2007), Annex, para 3 (d) and (e).

³⁹⁴ On 2 February 2007, the Senior Master of the Queen's Bench Division of the High Court ordered that all of those allegedly injured by the toxic waste dumped in Ivory Coast, should be permitted to bring their case as a single group (class-action/group litigation) rather than being forced to present their cases individually. See the website of Leigh Day, the law firm representing the victims, and the law firm that was also involved in the *Cape* case: <http://www.leighday.co.uk/doc.asp?doc=1032&cat=850>.

³⁹⁵ See Britain Urged To Probe Trafigura Toxic Waste Dumping In Ivory Coast , <http://www.rttnews.com/1971423/britain-urged-to-probe-trafigura-toxic-waste-dumping-in-ivory-coast.aspx>, last consulted 6 December 2013.

assume that now that the important procedural hurdle of forum non conveniens has been lifted by the European Court of Justice more suits against corporations will be launched”³⁹⁶.

The report was launched as parties to the Basel Convention met in Geneva providing an opportunity to ensure that toxic waste resulting from industrial process on board ships can never be dumped in poorer countries again.

6.12.1 Other cases

More recently, an incident between Brazil and the UK concerning the illegal shipment of hazardous wastes is similar to the *Trafigura* case. In July 2009, Brazilian port authorities detected a significant number of containers with origin in British ports that were mislabelled as recyclable plastic while they actually carried hazardous wastes. Brazil immediately informed the Secretariat and the UK under Article 19 of the Basel Convention of what it deemed to be a case of illegal traffic and requested formal consultations. In August, Brazil further announced its intention to request consultations with the UK at the WTO’s Dispute Settlement Body. However, the quick response by British authorities under Article 9(2) of the Basel Convention allowed them to settle the issue bilaterally. By September that year, most of the containers had already been returned to the UK, where enforcement action had been initiated against responsible persons.

6.13 Basel Convention on Ship Dismantling

The Basel Convention institutions consider ship dismantling, also known as ship “recycling”, as an inherently sustainable activity, the benefits of which are felt at the global level. As the term ship “recycling” implies, value is derived from the materials and equipment comprising end-of-life ships: the scrap steel is melted down and is commonly used in the construction industries of ship recycling countries, and equipment (engines, mechanical parts or furniture) is refurbished and re-used in other industries³⁹⁷.

The industry is based predominantly in South Asia: in India, Bangladesh and Pakistan, which according to 2010 statistics, occupies approximately 70% of the global ship recycling market. Significant recycling activity also takes place in China (19%), with Turkey and other countries occupying the remaining 10% of the market.

Problems abound in this industry. One such is when a ship for shipbreaking avoids the Basel Convention by hiding the fact that it is destined for that purpose. If the transaction simply indicates a sale of the ship to, e.g., an owner in India, and after the ship is in India it is broken up, no transboundary movement of “waste” would appear to have occurred. This scenario represents a possible legal loophole which needs to be addressed.

When the Basel Convention applies, the transboundary movement of such ships to the existing shipbreaking yards in non-OECD countries is prohibited. If one attempts to circumvent the Convention, however, while the transaction and movement may not be prohibited, the rationale and objectives of the Convention are applicable. The primary rationale and objectives of the Convention are to ensure Parties take responsibility for their hazardous waste, minimise generation and transboundary movements of

³⁹⁶ Jan Wouters and Cedric Ryngaert, “Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction”, *Institute for International Law, Working Paper No 124* (2008), 11-12.

³⁹⁷ See the Basel Convention website on Ship Dismantling, available at <http://www.basel.int/Implementation/TechnicalAssistance/ShipDismantling/Overview/tabid/2762/Default.aspx>

hazardous wastes, and ensure that their hazardous wastes do not damage human health or the environment in another State³⁹⁸.

Ships destined for ship-breaking operations fall within the definition of "wastes" as defined by the Basel Convention. The Convention defines "wastes" as: "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law" (Article 2, paragraph 1.).

The term "disposal" is further defined to mean "any operation specified in Annex IV to this Convention" (Article 2, paragraph 4). Annex IV includes final disposal operations and operations which lead to recovery, recycling, reclamation, direct re-use or alternative uses. Under Annex IV, paragraph B., ships destined for ship-breaking will, in fact, fall within the entry: "R4 Recycling/reclamation of metals and metal compounds"³⁹⁹.

Some of the problems and the solutions that the Basel Convention institutions have identified are:

i. The ship-breaking operations in non-OECD countries like India do not constitute environmentally sound management as required by the Convention. Ships destined for ship-breaking contain significant quantities of asbestos, PCBs, hydraulic fluids, paints containing lead and/or other heavy metals, tributyltin or TBT antifouling coatings, contaminated holding tanks, and other substances rendering them hazardous waste and extremely dangerous to human health and the environment when scrapped in the existing ship-breaking yards.

ii. In addition, Article 4, paragraph 3 requires the Parties to "consider that illegal traffic in hazardous wastes or other wastes is criminal." Article 4, paragraph 4 requires that "Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention."

iii. In order to export a ship for ship-breaking, there is a legal requirement to decontaminate it such that it no longer contains Basel Convention hazardous substances prior to export.

iv. Among other things, the Convention emphasizes prior informed consent and the disposal of waste in an environmentally sound manner.

v. Basel Technical Guidelines under the Basel Convention on Ship⁴⁰⁰ dismantling read as follows: "Transboundary movements of hazardous wastes or other wastes can take place only upon prior written notification by the state of export to the competent authorities of the states of import and transit."⁴⁰¹

To solve this situation, the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships was adopted at a diplomatic conference in Hong Kong, China, in May 2009. The Convention elaborates in its articles and regulations a control system for ship recycling, which includes

³⁹⁸ Greenpeace International / Basel Action Network, Shipbreaking and the Basel Convention - An Analysis, Prepared for the Technical Working Group of the Basel Convention, 12 April 1999, http://ban.org/subsidiary/shipbreaking_and.html

³⁹⁹ Gopal Krishna, "Supreme Court Upholds Basel Convention But Allows Hazardous US Ship Exxon Valdez", *Countercurrents.org* 30 July (2012) available at <http://www.countercurrents.org/krishna300712.htm>.

⁴⁰⁰ See the VI/24. Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships.

⁴⁰¹ Gopal Krishna, "Supreme Court Upholds Basel Convention But Allows Hazardous US Ship Exxon Valdez", *Countercurrents.org* 30 July (2012) available at <http://www.countercurrents.org/krishna300712.htm>

obligations for flag States and shipowners and recycling States and recycling facilities. Subsequently, in October 2011, the tenth meeting of the Basel Convention CoP encouraged parties to ratify the Convention to enable its early entry into force. COP 10 also acknowledged that the Basel Convention should continue to assist countries to apply the Basel Convention as it relates to ships (decision BC-10/17 on Environmentally sound dismantling of ships)⁴⁰².

6.14 The Implementation and Compliance Mechanisms and Ship Dismantling

Parties to the Basel Convention have requested the Secretariat to develop implementation programmes for sustainable ship recycling, where possible in collaboration with other organizations such as the International Maritime Organization (IMO) and the International Labour Organization (ILO).

Parties have recognised that ship recycling States and the facilities within their jurisdiction may require assistance in implementing the requirements of an international regime pertaining to ship recycling. The Secretariat thus seeks to assist those Parties with ship recycling industries in applying these controls through technical capacity building activities. To this end, the Secretariat developed the *Global Programme for Sustainable Ship Recycling* in 2007 to encourage collaboration between organizations, in particular with IMO and ILO, in facilitating improvements in worker health and safety and environmental conditions in ship recycling countries.

6.15 The EU Position on Ship Dismantling

The European Commission's Regulation on ship recycling adopted 10 December 2013 may be in breach of international law, according to two independent legal experts. The NGO Shipbreaking Platform, a global coalition of environmental, human rights and labour rights organisations, prompted two legal analyses, one by the Center for International Environmental Law (CIEL) and the other by Dr. Ludwig Krämer, the former chief counsel to the European Commission. Both reports concluded that the European Commission has greatly overstepped its authority because the proposed regulation would unilaterally depart from the EU's international legal obligations under the Basel Convention. The NGO Platform has also written a letter to the European Council asking that their legal analysis be released in the public interest.

The proposed regulation seeks to remove end-of-life ships from the European Waste Shipment Regulation, which is the EU's implementing legislation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the Basel Ban Amendment, which prohibits the export of all forms of hazardous waste from EU Member States to non-OECD countries.

The legal opinions suggest that the European Commission's regulation not only undermined the Basel Ban Amendment, which the EU has implemented and championed, but that it is also in breach of the Basel Convention. Dr. Krämer's legal analysis concludes that "any proposal to remove ships from the Waste Shipment Regulation is in breach of EU and EU Member States' legal obligations under the Basel Convention."⁴⁰³ CIEL's legal analysis authored by David Azoulay, was also in agreement, concluding that "the EU's Proposed Legislation attempting to unilaterally exempt a certain category of hazardous waste covered by the Basel Convention, namely end-of-life ships, from the control mechanisms of the Convention is illegal under international law and EU law."⁴⁰⁴

⁴⁰² Ibidem.

⁴⁰³ Dr. Ludwig Krämer's Legal Opinion is available here: <http://bit.ly/T3Oile>

⁴⁰⁴ The Center for International Environmental Law Legal Opinion is available here: <http://bit.ly/UM13PU>, http://www.ciel.org/HR_Envir/Basel_Shipbreaking_17Dec2012.html



With two independent legal analyses concluding the same, the Platform assumes the European Council Legal Services must hold similar concerns over legality. The legal opinion was already distributed to EU Member States and is expected to carry some weight in the EU co-decision making process, both in the EU Council and the EU Parliament. According to EU legislation, and existing case law, Council Legal opinions that are in the public interest should be released.

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